(10)

No. 01-131-CFX Title: Gary E. Gisbrecht, Barbara A. Miller, Nancy Sandine, and Donald L. Anderson, Petitioners
v.
Jo Anne B. Barnhart, Commissioner of Social Security

Docketed:
July 24, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jul 19 2001	Petition for writ of certiorari filed. (Response due October 24, 2001)
	Aug 15 2001	Order extending time to file response to petition until September 24, 2001.
	Sep 20 2001	Order further extending time to file response to petition until October 24, 2001.
	Oct 24 2001	Brief of respondent Larry G. Massanari, Acting Commissioner of Social Security in opposition filed.
	Nov 7 2001	DISTRIBUTED for Conference of November 21, 2001
	Nov 7 2001	Reply brief of petitioners Gary E. Gisbrecht, et al. (TBP) filed.
	Nov 26 2001	The petition for a writ of certiorari as to Gary E. Gisbrecht, Barbara A. Miller and Nancy Sandine is granted. The petition for a writ of certiorari as to Donald L. Anderson is denied. SET FOR ARGUMENT March 20, 2002.
		**********
	Jan 9 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including January 17, 2002.
	Jan 16 2002	Motion of petitioners to dispense with printing the joint appendix filed.
	Jan 17 2002	Brief of petitioners Gary Gisbrecht, Barbara Miller and Nancy Sandine filed.
	Jan 17 2002	Brief amicus curiae of Natl. Org. of Social Security Claimants' Representatives filed.
	Jan 17 2002	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Feb 1 2002	CIRCULATED.
	Feb 6 2002	Record filed.
	Feb 7 2002	Record filed.
	Feb 19 2002	Motion of petitioners to dispense with printing the joint appendix GRANTED.
	Feb 19 2002	Motion of the Solicitor General to permit David B. Salmons, Esquire, to present oral argument pro hac vice filed.
	Feb 19 2002	Brief of respondent Jo Anne Barnhart, Commissioner of Social Security filed.
	Feb 19 2002	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Mar 4 2002	Motion of the Solicitor General to permit David B. Salmons, Esquire, to present oral argument pro hac vice GRANTED.
	Mar 11 2002	Reply brief of petitioners Gary E. Gisbrecht, et al. filed.
	Mar 20 2002	ARGUED.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, and DONALD L. ANDERSON,

Petitioners,

vs.

LARRY G. MASSANARI,
Acting Commissioner of Social Security,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when determining a "reasonable" attorney fee to be paid by the plaintiff to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b), a court may give no effect to the plaintiff's contract to compensate plaintiff's attorney in terms of a contingent fee taking into account the contingent nature of the fee even when the contingent fee requested is within the statutory limitation of 42 U.S.C. § 406(b) for an attorney fee not to exceed "25 percent of the total of the past-due benefits," even when it is a criminal offense for an attorney to charge a non-contingent fee, and even when the contingent fee sought is consistent with the prevailing market rate.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gisbrecht, Miller, Sandine, and Anderson respectfully petition this Court to issue a *writ of certiorari* to review the judgment and memorandum disposition of the United States Court of Appeals for the Ninth Circuit filed November 27, 2000 and ordered published, with modifications, on January 22, 2001. (App. 1-11.)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Gisbrecht v. Apfel*, 238 F.3d 1196 (9th Cir. 2000). (App. 1-11.) In an unpublished Order filed April 20, 2001, the U.S. Court of Appeals for the Ninth Circuit denied Petitioners' petition for rehearing. (App. 42-43.) The four separate underlying opinions of the United States District Court for the District of Oregon are not published. These opinions appear in the Appendix as follows: *Anderson v. Apfel*, No. CV-96-6311-HO (D. Or. Sept. 29, 1999) (App. 12-16); *Gisbrecht v. Apfel*, No. CV-98-0437-RE (D. Or. Apr. 14, 1999) (App. 17-22); *Miller v. Apfel*, No. CV-96-6164-AS (D. Or. Mar. 30, 1999) (App. 23-32); *Sandine v. Apfel*, No. CV-97-6197-ST (D. Or. June 18, 1999) (App. 33-41).

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered November 27, 2000 and modified for publication on January 22, 2001. (App. 1-11.) The

Court of Appeals denied a timely petition for rehearing on April 20, 2001. (App. 42-43.)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 206(b) of the Social Security Act, 42 U.S.C. § 406(b), is at issue in the instant appeal. It currently provides:

(b) Attorney fees

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(B) For purposes of this paragraph –

(i) the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title, and

(ii) amounts of past-due benefits shall be determined before any applicable reduction under section 1320a-6(a) of this title.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

42 U.S.C. § 406(b).

STATEMENT OF THE CASE

Petitioners seek review of a judgment of the U.S. Court of Appeals for the Ninth Circuit affirming the award of attorney fees pursuant to 42 U.S.C. § 406(b)(1) as calculated using the "lodestar" method instead of the "contingent fee" method. The basis for federal jurisdiction in the court of first instance, the U.S. District Court for the District of Oregon, was 42 U.S.C. § 405(g), following issuance, in each of the four now-consolidated cases, of a final administrative decision by the Commissioner of Social Security.

The following facts are material to consideration of the question presented:

All four of the Petitioners entered into mutually consensual employment agreements with their attorneys, Tim Wilborn and Ralph Wilborn. The attorneys agreed to

represent Petitioners in federal court in their claims for Social Security Disability Insurance Benefits under Title II of the Social Security Act. 42 U.S.C. § 423. Assuming successful representation, the Petitioners agreed to pay their attorneys 25% of the past-due benefits recovered. These agreements were contingent upon a finding of disability by the Social Security Administration or a federal court. (*See* App. 67-71, App. 72-76, App. 77-81, and App. 82-86 for the employment agreements with Anderson, Gisbrecht, Miller, and Sandine, respectively.)

After successfully representing each Petitioner in the Petitioner's underlying disability claim, their attorneys filed petitions for attorney fees under both the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(B), and the Social Security Act, 42 U.S.C. § 406(b)(1).[1]

In *Anderson*, Attorney Tim Wilborn sought a § 406(b) fee of $175.00 per hour, i.e., 7.8% of the claimant's retroactive benefit award. (App. 12.) In *Gisbrecht*, he sought 25% of the claimant's retroactive benefits award, i.e., $283.64 per hour. (App. 19.) In *Sandine*, he sought a fee award of 25% of the claimant's retroactive benefits award,

[1] An award of attorney fees under 42 U.S.C. § 406(b), for federal court representation is deducted from the claimant's past-due disability benefits, whereas an EAJA award is paid separately by the government. Where fees are awarded under both provisions, for the same services, the EAJA compensation serves as a reimbursement to the claimant for fees paid out of the retroactive disability award, and double recovery is prevented in that the attorney must refund the amount of the smaller fee to the claimant. *See* Pub. L. 99-80, § 3, 99 Stat. 186 (1985).

i.e., $266.94 per hour. (App. 33-34.) In *Miller*, the Petitioner's attorneys sought a joint fee award of 25% of the claimant's retroactive benefits award, i.e., $188.27 per hour. (App. 27, 30.)

Pursuant to the guidance offered in *Blum v. Stenson*, 465 U.S. 886 (1984), in support of their § 406(b) fee petitions, Petitioners' attorneys submitted evidence which established that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. Petitioners' attorneys submitted their own affidavits in which they averred, in part, that –

1. 100% of their law practice is devoted to representing Social Security claimants pursuant to contingent fee contracts;
2. it is a statutory requirement that federal court Social Security disability appeals are undertaken upon a contingent fee basis;
3. it is a nearly universal practice that federal court appeals of Social Security disability matters are undertaken pursuant to contingent fee contracts wherein the claimant agrees to pay attorney fees limited to 25% of the claimant's retroactive benefits, upon approval by the court; and
4. that their customary rate[2] for federal court representation in Social Security matters

[2] In February and April, 1999, Attorney Tim Wilborn averred that *his* "current federal court contract provides for a fee of $250.00 per hour or 25% of the claimant's past-due benefits. Thus my hourly rate currently is $250.00 per hour." (App. 50 – *Gisbrecht*; App. 64 – *Sandine*.) By July, 1999, Tim

> mirrors this practice, and thus that the "market rate" for federal court Social Security appeals is based on Social Security appeals "as a class" and that the market rate therefore is not an hourly rate but simply 25% of a given claimant's retroactive benefits.

(App. 44-47, 48-52, 53-57, 58-61, and 62-66.)

Petitioners also submitted affidavits from Attorneys Young, Brewer, and Schnaufer who attested that they had special expertise in Social Security disability matters, and that –

1. Attorneys for Social Security plaintiffs nearly always use fee contracts which provide for a contingent attorney fee equaling 25% of the claimant's retroactive benefits (App. 88, 89, 91);

2. for representation before the Social Security Administration (not the federal courts) most attorney fee contracts specify a maximum fee, typically $4,000.00, but that even with this upper limit, the typical recovery based on time expended for a successful case averages substantially above $250.00 per hour (App. 88, 89); and

3. there is no true "market rate" for attorney fees for plaintiffs for Social Security benefits because there is a statutory maximum on the amount of attorney fees a court may award

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Wilborn's contract provided for a fee of 25% of the claimant's past-due benefits. (App. 46 – *Anderson*.) All four contracts at issue were signed with the attorneys of the professional corporation, Ralph Wilborn & Etta L. Wilborn, P.C.

> and because almost all attorney fee agreements for legal services for Social Security disability insurance benefits plaintiffs specify that attorney fees will be the statutory maximum fees, *i.e.*, 25% of past due benefits payable (App. 88, 89-90, 91).

Petitioners also submitted an Oregon State Bar Economic Survey – the Flikirs report – which established that Oregon attorneys are compensated on winning contingent fee cases at an average hourly rate which more than makes up for non-payment on the losing contingent fee cases and that, therefore, the requested rates are "in line with" the rates of other attorneys in the relevant fora. (App. 93-97.)

Under the EAJA, each District Court awarded attorney fees at the artificial statutory hourly cap of $125.00 plus cost of living adjustments. In contrast, and purporting to base their § 406(b) fee award on the "lodestar" method, the District Courts in *Gisbrecht*, *Miller*, and *Sandine*, awarded § 406(b) fees to Attorney Tim Wilborn at $125.00 per hour. (App. 22, *Gisbrecht* – $125.00; App. 31, *Miller* – $125.00; App. 39, *Sandine* – $125.00.) In *Anderson*, the District Court awarded Attorney Tim Wilborn § 406(b) fees at $150.00 per hour. (App. 15.)

In *Miller*, the district court awarded § 406(b) fees to Attorney Ralph Wilborn at $150.00 per hour. (App. 31.)

None of the District Courts based their awards on market rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation; none enhanced the award based on

the contingent nature of the parties' employment agreements; and none gave any weight to the intentions of the parties as expressed in their employment agreements.

Moreover, instead of using data from the Flikirs report to derive rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," the District Courts which referred to the Flikirs report simply referred to the generic hourly billing rates attorneys were charging based on their years of practice. (App. 21, 38-39.)

The Flikirs report does not contain separate categories reporting the billing practices of attorneys providing Social Security representation. It does not separately report income or hourly rates of attorneys providing services which are "similar" to the services provided by federal court Social Security attorneys. Nor do its geographic "hourly billing method" data pertain to "the prevailing market rates" for "lawyers of reasonably comparable skill and reputation," as required by *Blum*. At best, one may use such "hourly billing" data to arrive at "market rates" in a two-step inquiry. *First*, after the requested fees in the instant cases are reduced to artificial hourly rates, these artificial rates can be compared to the Flikirs hourly rates to determine if they are "in line with" such rates. Using *Gisbrecht* as an example,[3] the requested fee of $7,091.50 (for 25.08 hours of representation)

[3] The argument applies equally to *Miller*, *Sandine*, and *Anderson*.

reduces to an artificial hourly rate of $282.75.[4] (App. 19.) Comparing this artificial hourly rate with those listed in the Flikirs report establishes that it is "in line with" those in the report.

As App. 94 establishes, the non-contingent overall hourly billing rates in Portland, the relevant forum, range from a low of $25.00 per hour to a high of $300.00 per hour. Although the requested rates in each of these four cases are contingent, they, nevertheless, are "in line with" the rates of other attorneys in Portland as required by *Blum*.

The *second* step of the inquiry requires determining whether the requested rates are in line with those prevailing in the community for *similar services of lawyers of reasonably comparable skill and reputation*. The Flikirs report does not address this issue. However, the affidavits and declaration of Petitioners' attorneys and Attorneys Young, Brewer and Schnaufer establish that, not only in Oregon, but throughout the nation, typical rates for *similar* services substantially exceed $250.00 per hour and are otherwise 25% of a claimant's retroactive benefits. Accordingly, this step of the inquiry must also be resolved in favor of Petitioners.

The data in the Flikirs report establish that in order for the District Courts to award § 406(b) fees at prevailing *market* rates, the courts *must* account for the contingent nature of Social Security cases as a class. The Flikirs report shows that Oregon attorneys spend 15% of their

[4] The district court incorrectly calculated the hourly rate in *Gisbrecht* at $283.64. (App. 19.)

time on contingent fee matters, but that they derive 16% of their income from "contingency billing." (App. 97.) For each 100 hours of attorney time, Oregon attorneys devote 15 hours to contingent fee matters, and they derive 16% of their income from contingent fee matters. This is equivalent to 16 hours of compensation for 15 hours of work. Thus, viewed globally, Oregon attorneys in contingent fee matters charge high enough attorney fees to make up for any risk of loss.

The data at page 98 of the Appendix establish that federal courts allowed (i.e., ruled that plaintiffs were entitled to benefits) only 6% of the Social Security disability and Supplemental Security Income disability cases in Fiscal Year 1997. The courts also remanded 42% of such cases to the agency for additional administrative proceedings. While the outcome of the remand proceedings is not stated, construing the data in the light least favorable to Petitioners' attorneys, 48% of the cases were decided favorably to plaintiffs.

Using data from *Gisbrecht* as an example, based on the District Court's awarding a lodestar of $125.00 per hour to Tim Wilborn before contingency is considered (App. 22), the Flikirs data establish that his hourly rate must be at least double that in order to bring his rate "in line with" the average Oregon attorney. Thus, the proffered evidence established that the requested rates by Petitioners' attorney are in line with those of lawyers of reasonably comparable skill, experience, and reputation as required by *Blum*.

REASONS FOR GRANTING THE WRIT: ARGUMENT

I. Introduction: The Circuits Are In Conflict Regarding Whether The Lodestar Or Contingent Fee Method Is Used To Calculate Attorney Fees As A Part of A Judgment Awarding A Plaintiff Benefits Under Title II Of The Social Security Act.

Benefits for individuals under Title II of the Social Security Act include Disability Insurance Benefits. 42 U.S.C. § 423. Section 206 of the Social Security Act, 42 U.S.C. § 406, provides for two basic kinds of fees for representing a claimant for Title II benefits that the *claimant* pays: fees for representing a claimant during administrative proceedings, *see* 42 U.S.C. § 406(a), and attorney fees for representing a plaintiff in federal court, *see* 42 U.S.C. § 406(b). This petition concerns the latter kind of fees, i.e., attorney fees that a court may award from the plaintiff's past-due Title II benefits whenever the plaintiff receives such benefits by virtue of the court's judgment. 42 U.S.C. § 406(b). This petition presents the issue of how a court calculates the amount of such attorney fees under 42 U.S.C. § 406(b).

Section 406(b) requires a contingent fee agreement; it prohibits an attorney from charging a plaintiff a non-contingent attorney fee. The central question presented in this case is whether the "lodestar" method or the "contingent fee" method governs when a court determines a "reasonable" attorney fee to be paid *by the plaintiff* to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b) when, as is always the case, the underlying agreement between the plaintiff and plaintiff's attorney is to compensate plaintiff's attorney in terms of a contingent fee. The question presented also concerns the extent to which a court

must give effect to the plaintiff's contract with plaintiff's attorney to pay a contingent fee reflecting the contingent nature of the fee.

The lodestar method starts by multiplying the reasonable hours expended by a reasonable hourly rate: this product is the lodestar. The lodestar then may or may not be adjusted upwards or downwards according to several factors, one of which may be the contingent nature of the fee. In contrast, the contingent fee method starts by ascertaining the amount of attorney fees owed pursuant to the contingent fee agreement between the plaintiff and plaintiff's attorney and then verifying that this amount is reasonable.

In determining an award of "reasonable" attorney fees under 42 U.S.C. § 406(b)(1), the United States Courts of Appeals are split between following the lodestar method borrowed from federal fee-shifting jurisprudence and the contingent fee method reflecting a common practice of the private marketplace for legal services. The Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits use the lodestar method. *See Coup v. Heckler*, 834 F.2d 313 (3d Cir. 1987); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324 (4th Cir. 1989); *Brown v. Sullivan*, 917 F.2d 189 (5th Cir. 1990); *Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989); *Gisbrecht v. Apfel*, 238 F.3d 1196 (9th Cir. 2000); *Hubbard v. Shalala*, 12 F.3d 946 (10th Cir. 1993); *Kay v. Apfel*, 176 F.3d 1322 (11th Cir. 1999). In contrast, the Second, Sixth, and Seventh Circuits utilize the contingent fee method. *See Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990) (*Wells II*); *Rodriquez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (*en banc*); *McGuire v. Sullivan*,

873 F.2d 974 (7th Cir. 1989).[5] The Court should grant the petition for a writ of certiorari to resolve the split between the Circuits and recognize that the contingent fee method is fully consistent with the text of 42 U.S.C. § 406(b).[6] *Cf. Hopkins v. Cohen*, 390 U.S. 530 (1968) (resolving Circuit conflict regarding the scope of past-due benefits mentioned in 42 U.S.C. § 406(b)(1)).

The Court should also grant the petition because the question presented is an important federal question. The Social Security Act is a federal program, national in scope, and remedial in purpose; there is a compelling need for uniformity in the methodology by which "reasonable" attorney fees are determined under 42 U.S.C. § 406(b)(1).

Further, since 42 U.S.C. § 406(b) prohibits an attorney from charging a plaintiff a non-contingent fee, the lodestar method when not enhanced to reflect the contingent

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[5] The First Circuit appears not to have formally adopted either approach. However, interpreting the First Circuit's holding in *Ramos Colon v. Secretary of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988), that "the determination of a reasonable attorney's fee rests within the sound discretion of the district court," a district court in the First Circuit adopted the contingent fee method employed by the Second and Seventh Circuits. *See Lombardo v. Secretary of Health and Human Servs.*, 888 F. Supp. 209, 210-12 (D. Mass. 1994).

[6] Because it is largely if not entirely discretionary under the lodestar method whether to enhance the lodestar to take into account the contingent nature of the fee, *see, e.g., Gisbrecht*, 238 F.3d at 1198-1200, no Circuit has disputed that there is a substantive difference between the lodestar method and the contingent fee method.

nature of the fee, necessarily forces the attorney to internalize the risk of loss. This result, essentially requiring attorneys to work pro bono, serves as a disincentive for qualified counsel to represent plaintiffs for Title II benefits. In any case, because the myriad protections of the plaintiff seeking Title II benefits are so strong relative to the protections of claimants seeking Title II and Title XVI benefits via administrative proceedings and relative to the plaintiffs seeking Title XVI benefits, as matters of Congressional intent and sound policy, effect should be given to the terms of a plaintiff's promise to plaintiff's attorney to pay attorney fees as a percentage of past-due Title II benefits received as a result of a court's judgment.

II. Respecting A Private Plaintiff's Agreement To Pay Attorney Fees Pursuant To The Terms Of A Contingent Fee Agreement Is Fully Consistent With 42 U.S.C. § 406(b).

A. 42 U.S.C. § 406(b) Prohibits An Attorney From Charging A Non-Contingent Fee.

The plain language of § 406(b)(1) mandates that "no other fee may be payable or certified for payment for such representation except as provided in this paragraph." 42 U.S.C. § 406(b). In other words, the statute requires that any attorney fee paid from Title II benefits for representation of a plaintiff in federal court be contingent upon a judgment favorable to the plaintiff and also that the judgment result in the payment of past-due benefits. Thus, for example, an attorney may not charge a plaintiff for Title II benefits any attorney fee if judgment is entered for the Commissioner. By law, a losing plaintiff

for Title II benefits owes his or her attorney no attorney fee.

The statutory prohibition on charging a plaintiff for Title II benefits a non-contingent attorney fee has teeth:

> (2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

42 U.S.C. § 406(b)(2). Congress has criminalized charging a plaintiff for Title II benefits a non-contingent fee.

Considering just this one fact – the criminalization of charging a Title II plaintiff a non-contingent attorney fee – a court should hesitate before giving no effect to a plaintiff's contract with plaintiff's attorney to pay plaintiff's attorney in terms of a percentage of the recovery of past-due Title II benefits. It would be anomalous for Congress to require an attorney to charge a contingent fee yet prohibit that same attorney from receiving a fee that reflected the contingent nature of the fee.

Legislative history establishes that Congress was well aware of the use of contingent fee agreements in federal court cases involving Title II benefits:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court

> actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins the case.

S. Rep. No. 404, 89th Cong., 1st Sess. U.S.C.C.A.N. 305, 2062 (1965). To remedy the potential for such abuse, however, Congress chose not to prohibit contingent fee agreements, but in fact to require them. As the Second Circuit commented in *Wells II*, the statute "seeks only to regulate the contingent fees favorably to the plaintiff b limiting the contingency to 25%." *Wells II*, 907 at 37..

Further, the legislative history does not evidence any Congressional intent to require that attorneys for Title II plaintiffs assume all the risk of loss, i.e., not transfer any of the risk of loss to Title II plaintiffs who receive Title II benefits as part of the court judgments in their favor. Yet, this is the practical effect of the lodestar method if the lodestar is not enhanced to reflect the contingent nature of the fee.

B. By Its Plain Language, 42 U.S.C. § 406(b) Does Not Require Use Of The Lodestar Method.

Besides requiring the use of a contingent fee agreement between a Title II plaintiff and the plaintiff's attorney, § 406(b) does not require the use of the lodestar method. Section 406(b)(1) states, in pertinent part, that "[w]henever a court renders a judgment favorable to a

claimant . . . who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. § 406(b)(1).

By its plain terms, § 406(b) authorizes a court to award a "reasonable" attorney fee limited only by the cap of 25% of the plaintiff's past-due benefits. 42 U.S.C. § 406(b). Beyond this, nothing in § 406(b)(1) regulates what plaintiffs for Title II benefits may promise to pay their attorneys if they win. *Id.* Certainly, § 406(b)(1) does not prevent the plaintiff from promising an attorney a percentage of the past-due benefits that are awarded so long as the percentage is 25% or less. 42 U.S.C. § 406(b); *see also* Sen. Rep. No. 404, 1965 U.S.C.C.A.N. 1943, 2062. Neither the statute nor its legislative history displays any intent to invalidate contingent fee arrangements. Nor is there anything in the legislative history to suggest that, beyond the expressly stated 25% cap on past-due benefits, Congress intended § 406(b)(1) to limit the freedom of Title II plaintiffs to contract with their attorneys.

Indeed, depriving plaintiffs of the option of promising to pay the maximum statutory fee, if that is necessary to secure counsel of their choice, would contravene the purpose of § 406(b)(1) to enable Title II plaintiffs to secure competent counsel.

Venegas v. Mitchell, 495 U.S. 82 (1990), is elucidative. In *Venegas*, this Court recognized that the general purpose of § 1988 in civil rights cases was to enable plaintiffs

to secure competent counsel by ensuring adequate compensation to their attorneys. *Venegas*, *Id.* at 89-90. However, a civil rights plaintiff may, without offending the purpose of § 1988, contract to pay plaintiff's attorney more than the amount of the fee shifted to the defendant through an agreement to pay the attorney a contingent fee. *Id.*

The general purpose of § 406(b)(1) is no different. It is entitled to equal deference. Thus, just as a civil rights plaintiff may, without offending the purpose of § 1988, contract to pay his or her attorney more than the amount of the fee shifted to the defendant, *see Venegas*, 495 U.S. at 89-90, so too a Social Security plaintiff may normally contract up to the maximum allowed by statute without offending § 406(b).

C. Because The Protections of Title II Plaintiffs Through 42 U.S.C. § 406(b) And The EAJA Offset Are Comparatively Vast, The Lodestar Method Used Without An Enhancement To Reflect The Contingent Nature Of The Attorney Fee Is Inappropriate.

The protections of plaintiffs for Title II benefits in 42 U.S.C. § 406(b) are vast when compared with the protections of plaintiffs for Title XVI benefits and when compared with the protections of claimants at the administrative level for Title II and Title XVI benefits. This is a strong reason why a Court should not impose still another protection of plaintiffs for Title II benefits by refusing to apply the contingent fee method or refusing to enhance the lodestar to reflect the contingent nature of the fee when applying the lodestar method.

As noted, Congress did *not* prohibit § 406(b) contingent fee agreements, but instead required contingent fee agreements and concomitantly chose to regulate those agreements. Moreover, the statutory limitation on attorney fees in § 406(b) favors plaintiffs for Title II benefits in three substantial ways. *First*, contingent fee agreements are limited to fees from past-due benefits. Thus, unlike the practice in personal injury cases where the fee may be 30-40% of a lifetime of benefits, § 406(b) fees are recouped only from past-due benefits.

Second, contingent fee agreements are capped at a maximum of 25% of past-due Title II benefits. An attorney cannot receive a portion of the Title II plaintiff's future benefits (which may be for the plaintiff's entire life) or a portion of the value of medical care tied to Title II benefits (e.g., Medicare). Thus, § 406(b) leaves untouched major benefits achieved through litigation – health care insurance and future benefits (subject to a continuing disability review).

Third, under § 406(b), only a "reasonable" attorney fee is awarded.

In contrast to these three protections of Title II plaintiffs through § 406(b), there is no limitation in the Social Security Act on the amount of attorney fees an attorney may charge a plaintiff seeking only Title XVI benefits, i.e., Supplemental Security Income. Although a court may not award attorney fees to an attorney for a plaintiff for Title XVI benefits as a portion of any Title XVI benefits, *see Bowen v. Galbreath*, 485 U.S. 74 (1988), the Social Security Act does not prohibit an attorney from charging a plaintiff for Title XVI benefits any amount of future or past-

due benefits that the plaintiff receives as a result of a court judgment. Of course, there are limitations on attorney fees outside of the Social Security Act, e.g., the usual rules of the relevant state bar. Yet, absence of regulation of attorney fees in the Social Security Act for Title XVI plaintiffs is evidence that Congress did not intend § 406(b) to provide Title II plaintiffs with more protection than § 406(b) expressly provides.

A comparison with fees for representation at the administrative level under 42 U.S.C. § 406(a) is also instructive. Congress explicitly endorsed contingent fee agreements in § 406(a) cases. Under § 406(a), if the statutory requisites are met, the agency automatically approves as an attorney fee 25% of past-due benefits, or $4,000, whichever is less *even if the effective hourly rate is $4,000*. 42 U.S.C. § 406(a). As the Sixth Circuit has noted with respect to § 406(b):

> It is not at all unusual for contingent fees to translate into large hourly rates if the rate is computed as the trial judge has computed it here [dividing the total award by the number of hours spent on the case]. In assessing the reasonableness of a contingent fee award, we cannot ignore the fact that the attorney will not prevail every time. The hourly rate in the next contingent fee case will be zero, unless benefits are awarded. Contingent fees overcompensate in some cases and undercompensate in others. It is the nature of the beast.

Royzer v. Secretary of Health and Human Servs., 900 F.2d 981, 982 (6th Cir. 1990). Because Congress directed the agency to approve summarily certain fees for representation at the administrative level even if the hourly rate is

many times what any reasonable non-contingent hourly rate would be, this Court should infer that Congress did not intend for the contingent nature of a fee under § 406(b) not to be taken into account when a court determines the amount of an attorney fee under § 406(b).

Further, in contrast to § 406(b)'s 25% cap on an award from past-due benefits, under § 406(a), if an attorney chooses not to pursue an automatic fee authorization, the attorney may petition the agency to approve an attorney fee up to 100% of past-due benefits. 42 U.S.C. § 406(a). Indeed, under the agency's regulation, the agency "may authorize a fee even if no benefits are payable." 20 C.F.R. § 404.1725(b)(2) (2001). The statutory reference to a fee of 25% of past due Title II benefits under § 406(a) addresses only what the agency will automatically approve and withhold as a potential fee. 42 U.S.C. § 406(a).

Thus, viewed in the context of the absence of protection of Title XVI plaintiffs, the routine payment of attorney fees under § 406(a) inconsistent with any lodestar calculation without an enhancement to reflect the contingent nature of the fee, and potential recovery of 100% of any past-due Title II or Title XVI benefits under § 406(a), the lodestar method for computing an attorney fee under § 406(b) is alien to the Social Security Act. Rephrased, it would be inconsistent for Congress to respect as a routine matter contingent fee agreements for § 406(a) fees reflecting the contingent nature of the fee, yet disrespect contingent fee agreements for § 406(b) fees insofar as those agreements took into account the contingent nature of the fee.

Section 406(b) does not exhaust the protections Congress affords a Title II plaintiff. Apart from any attorney fee under § 406(b), a plaintiff may receive an award of attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). A court awards attorney fees under the EAJA when, among other things, the plaintiff is a prevailing party, the government's position was not substantially justified, and the plaintiff is an eligible party by virtue of his or her net worth. 28 U.S.C. § 2412(d)(1), (2). Significantly, Congress requires any recovery under § 406(b) to be offset by any award of attorney fees under the EAJA:

> (b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Pub. L. 99-80, § 3, 99 Stat. 186 (1985). The EAJA offset thus potentially drastically reduces any attorney fees under § 406(b). For instance, if an EAJA award and § 406(b) award are based on the same number of hours of attorney time, a plaintiff would ultimately pay only the difference in the hourly rates for the EAJA and § 406(b) awards. Therefore, if the hourly rate after giving effect to a plaintiff's agreement to pay 25% in past due Title II benefits is $225.00, if the hourly rate for the § 406(b) fee under the lodestar method is $150.00, and if the hourly

rate for the EAJA award is $140.00,[7] the plaintiff would ultimately pay his or her attorney only $85.00 per hour under the contingent fee method or $10.00 per hour under the lodestar method. Obviously, then, for the large class of plaintiffs for Title II benefits who are also entitled to EAJA awards, the attorney fee ultimately paid will be less than the attorney fee calculated under either lodestar or contingent fee methods.

In sum, given the comparatively vast protections of Title II plaintiffs through § 406(b) and the additional protection of the EAJA offset, a court should use the contingent fee method when calculating the amount of a § 406(b) award when the plaintiff and plaintiff's attorney have previously agreed to compensate plaintiff's attorney in terms of the past-due benefits recovered.

III. Under the American Rule Of 42 U.S.C. § 406(b), Reasonable Attorney Fees Paid By A Private Plaintiff For Title II Benefits To The Plaintiff's Attorney May Reflect The Contingent Nature Of The Fees.

Under the American Rule, parties are ordinarily required to bear their own attorney fees – the prevailing party is not entitled to collect from the loser. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 121 S.Ct. 1835, 1839 (2001); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

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[7] The EAJA permits courts to award attorney fees reflecting an increase in the cost of living over the EAJA's statutory rate of $125.00. 28 U.S.C. § 2412(d)(2)(A). Roughly, the EAJA hourly rate for 2001 reflecting an increase in the statutory rate due to the increase in the cost of living is $140.00.

Consistent with the American Rule, agreements between plaintiffs and their attorneys to pay attorney fees based on a contingent fee reflecting the contingent nature of the fees are common in modern civil litigation and pervasive in some areas of modern civil litigation such as personal injury. *See, generally,* American Bar Ass'n, Model Rules of Professional Conduct, Rule 1.5 (2001); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 735-37 (1987) (Blackmun, J., dissenting) (describing contingent fee agreements in the private marketplace) There is no basis in law or in the modern legal marketplace to maintain that a contingent fee agreement in which the compensation reflects the contingent nature of the fee is ipso facto unreasonable or presumptively unreasonable when the underlying civil action concerns the allocation of money outside of the context of family law. Moreover, because Congress crafted § 406(b) with full awareness of the use of contingent fee agreements for recovery of Title II benefits, Congress cannot reasonably be imputed to have legislated that "reasonable" attorney fees under § 406(b) do not include attorney fees awarded consistent with a contingent fee agreement reflecting the contingent nature of the fees. By restricting awards of attorney fees under § 406(b) to "reasonable" fees, Congress did not declare unreasonable contingent fee agreements between a private party and that private party's attorney that accounted for the contingent nature of the fees.

IV. The Rule Of *City of Burlington v. Dague* Has No Application In The Context of 42 U.S.C. § 406(b) Involving A Private Plaintiff's Contract With That Plaintiff's Own Attorney.

The rule of this Court is clear with respect to fee-shifting statutes: neither the contingent fee method nor the lodestar method with an enhancement for a contingent recovery may be used to calculate a "reasonable" fee under a fee-shifting statute. *City of Burlington v. Dague*, 505 U.S. 557, 562-67 (1992). This rule of *Dague* has no application in the context of § 406(b).

First and most obviously, § 406(b) is not a fee-shifting statute, but the partial regulation of agreements between private plaintiffs and those plaintiffs' attorneys.[8] Section 406 is not a fee-shifting statute where the winner's attorney fees are paid by the loser; it is a statute which places a "*parens patriae* limit on the amount of fees an attorney may receive from a disability claimant." *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989).

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[8] Yet, when there is a fee-shifting statute in addition to § 406(b) – i.e., the EAJA – this does not negate a plaintiff's contract with the plaintiff's attorney to pay an attorney fee in excess of any attorney fee recovered from the defendant. *See Venegas*, at 89-90 ("But neither *Blanchard* nor any other of our cases has indicated that § 1988, by its own force, protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents. Indeed, depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further § 1988's general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel.").

Second, *Dague* did not involve a case in which the plaintiff's attorney was prohibited from charging a plaintiff a non-contingent fee. In *Dague*, the plaintiffs' attorneys were free to contract with the plaintiffs to pay attorney fees irrespective of the outcome of the litigation. Section 406(b), however, prohibits attorneys from receiving non-contingent fees from plaintiffs for Title II benefits.

Third, in *Dague*, this Court was concerned with the "ready administrability" of calculating a contingency enhancement to the lodestar calculation. *Dague*, 505 U.S. at 566. The same concern does not exist in the § 406(b) context where reference to the underlying agreement between the Title II plaintiff and the plaintiff's attorney can guide the calculation of an attorney fee reflecting the contingent nature of the fee. *See Wells II*, 907 F.2d at 371 ("Third, because § 406(b) requires the district court to review the reasonableness of any requested fee, contingent fee agreements cannot simply be adopted as per se reasonable in all social security cases. We must recognize, however, that a contingency agreement is the freely negotiated expression both of a claimant's willingness to pay more than a particular hourly rate to secure effective representation, and of an attorney's willingness to take the case despite the risk of nonpayment. Therefore, we ought normally to give the same deference to these agreements as we would to any contract embodying the intent of the parties.") (internal citations omitted); *McGuire*, 873 F.2d at 981 ("Although we do not go as far as the *Rodriquez* court in finding a presumption in favor of a twenty-five percent contingency agreement, we agree with that court's reasoning that we should follow a more efficient

system for fee analysis and should defer to the parties' intentions where reasonable."); *Rodriquez*, 865 F.2d at 746 ("Nevertheless, if the agreement states that the attorney will be paid twenty-five percent of the benefits awarded, it should be given the weight ordinarily accorded a rebuttable presumption.").

In short, there is no tension between the rule of *Dague* and use of the contingent fee method to calculate court-awarded, plaintiff-paid attorney fees under § 406(b).

This Court should grant the petition for a writ of certiorari to resolve the split in the Circuits over the appropriate method for calculating reasonable attorney fees pursuant to 42 U.S.C. § 406(b). The Court should then hold that a court should use the contingent fee method to calculate reasonable attorney fees pursuant to § 406(b).

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY E. GISBRECHT, *Plaintiff-Appellant,* v. KENNETH S. APFEL, Commissioner of the Social Security Administration, *Defendant-Appellee.*	No. 99-35496 D.C. No. CV-98-00437-JAR

BARBARA A. MILLER, *Plaintiff-Appellant,* v. KENNETH S. APFEL, Commissioner of the Social Security Administration, *Defendant-Appellee.*	No. 99-35497 D.C. No. CV-96-06164-DCA

NANCY SANDINE,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-36038
D.C. No.
CV-97-06197-JMS

DONALD L. ANDERSON,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-36131
D.C. No.
CV-96-06311-MRH
ORDER

Filed January 22, 2001

Before: Cynthia Holcomb Hall, Pamela Ann Rymer, and Susan P. Graber, Circuit Judges.

ORDER

The Memorandum disposition filed November 27, 2000, with modifications, is redesignated as an authored Opinion by Judge Graber.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY E. GISBRECHT,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-35496
D.C. No.
CV-98-00437-JAR

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

BARBARA A. MILLER,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-35497
D.C. No.
CV-96-06164-DCA

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

NANCY SANDINE,
Plaintiff-Appellant,
v.
KENNETH S. APFEL, Commissioner of the Social Security Administration,
Defendant-Appellee.

No. 99-36038
D.C. No.
CV-97-06197-JMS

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

DONALD L. ANDERSON,
Plaintiff-Appellant,
v.
KENNETH S. APFEL, Commissioner of the Social Security Administration,
Defendant-Appellee.

No. 99-36131
D.C. No.
CV-96-06311-MRH

OPINION

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Argued and Submitted
November 17, 2000 – Portland, Oregon

Filed November 27, 2000

Before: Cynthia Holcomb Hall, Pamela Ann Rymer, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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OPINION

GRABER, Circuit Judge:

These cases were consolidated for oral argument. In each case, a district court reversed a decision of the Commissioner of the Social Security Administration, and Plaintiffs sought attorney fees under 42 U.S.C. § 406(b)(1)(A).[1] The district courts awarded attorney fees, but in lesser amounts than Plaintiffs had requested. Plaintiffs appeal. We review for abuse of discretion, *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998), and affirm.

I. ARGUMENTS COMMON TO ALL FOUR CASES

Plaintiffs argue on several grounds that the district courts abused their discretion. Their primary arguments – concerning the hourly lodestar rate and the requested enhancement based on the contingent nature of the fee

[1] Although the disabled claimants – Gisbrecht, Miller, Sandine, and Anderson – are the named plaintiffs in these actions, the real parties in interest are their lawyers, Tim and Ralph Wilborn. For convenience, the Wilborns are referred to as "Plaintiffs."

arrangement – pertain to all four cases, with minor differences as noted.

This court follows the "lodestar" method of calculating fees under 42 U.S.C. § 406(b)(1)(A). *Allen v. Shalala*, 48 F.3d 456, 458 (9th Cir. 1995); *Starr v. Bowen*, 831 F.2d 872, 874 (9th Cir. 1987).[2] The lodestar method requires a court to determine a reasonable hourly rate and then to multiply that rate by the number of hours reasonably expended on the case; the product determines a reasonable fee. *See Allen*, 48 F.3d at 458. That fee may be adjusted by applying the 12 factors set out in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). *Allen*, 48 F.3d at 458. Only one of those factors is at issue in this case: "whether the fee is fixed or contingent." *Kerr*, 526 F.2d at 70.

A. *The District Courts Did Not Abuse Their Discretion in Determining Plaintiffs' Hourly Lodestar Rates.*

The district courts in each of these cases set hourly lodestar rates lower than those that Plaintiffs had

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[2] So do the Fifth Circuit, *see Brown v. Sullivan*, 917 F.2d 189 (5th Cir. 1990); the Eighth Circuit, *see Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989); and the Fourth Circuit, *see Craig v. Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324 (4th Cir. 1989).

Other circuits follow the "contingency" method, under which a court bases its award of fees on the contingent-fee contract between the attorney and the claimant, treating that contract as presumptively reasonable. *See Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990); *McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989); *Rodriguez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (en banc).

This court has noted the split of circuits and has rejected the contingency method expressly. *Allen*, 48 F.3d at 459.

requested. Plaintiffs argue that the district courts abused their discretion in so doing, because the evidence that they presented was sufficient to demonstrate that the rates that they requested were in line with the "market rate."

Plaintiffs' argument on this issue is twofold. *First*, they argue that the actual "market rate" for their services is the maximum fee allowed under 42 U.S.C. § 406(b): 25 percent of the past-due benefits that the claimants recovered. In so arguing, Plaintiffs are in essence asking the panel to adopt the contingency method, see *supra* note 2. But, as noted, this court has rejected the contingency method. *Allen*, 48 F.3d at 459. "The district court does not sit to approve routinely a contingent fee contract between social security claimants and their counsel." *Starr*, 831 F.2d at 874.

Rather, a district court must set a reasonable lodestar rate for counsels' services. To the extent that Plaintiffs are arguing that 25 percent *is* the appropriate lodestar rate, and thereby are attempting to blur the distinction between the lodestar and contingency methods, their argument is unavailing. A lodestar rate is "a reasonable *hourly* rate." *Widrig*, 140 F.3d at 1209 (emphasis added) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). But 25 percent is not an "hourly rate."

Second, Plaintiffs point out that, in some previous cases, they received awards of as much as $175 per hour (Tim Wilborn) and $200 (Ralph Wilborn) under 42 U.S.C. § 406(b)(1)(A). The district courts here considered that evidence but chose instead to follow cases in which Plaintiffs had received awards based on lower hourly rates.

The district courts did not abuse their discretion in so doing.

In the same vein, Plaintiffs argue that their requested hourly rates are "in line" with the rates reported in a recent survey by the Oregon State Bar. The district courts that referred to the survey used it as evidence of the average hourly rates of lawyers in Plaintiffs' geographic area. The survey reveals that the average hourly rate for a lawyer of Tim Wilborn's experience is $125 and that the average hourly rate for a lawyer of Ralph Wilborn's experience is $150. The district courts that considered the survey awarded those average hourly rates. Plaintiffs suggest another way in which the district courts *could have* used the information in the survey, which would have yielded a higher hourly rate, but do not explain why the manner in which the courts *did* use that information was improper.

B. *The District Courts Did Not Abuse Their Discretion by Refusing to Increase the Lodestar Based on Plaintiffs' Contingent-Fee Contracts.*

Plaintiffs also argue that the district courts abused their discretion by refusing to increase the lodestar fees based on the contingent nature of their fee agreements.

First, in *Gisbrecht*, Plaintiffs argue that the district court should have (1) considered the inherent riskiness of Social Security appeals *as a class*, (2) noted that *all* such appeals are risky propositions, and (3) enhanced the lodestar fee to take account of that inherent risk. That argument already has been rejected by this court. *See Widrig*, 140 F.3d at 1210-11 (rejecting the plaintiff's request for a

contingency-based enhancement and specifically rejecting the argument "that we should examine the contingency of Social Security cases as a class rather than assessing the riskiness of a particular case").[3]

Next, Plaintiffs argue that the district courts should have applied "contingency enhancement factors" or "risk multipliers" to their lodestar fees. Essentially, Plaintiffs argue that the district courts should have multiplied the hourly lodestar rates by a mathematically derived number to account for the fact that lawyers who accept contingent-fee contracts in Social Security cases sometimes do not get paid.

This court also has rejected that argument. In *Straw v. Bowen*, 866 F.2d 1167, 1170 (9th Cir. 1989), the court addressed the plaintiffs' contention that their requested hourly rates were "justified by the 'big picture': the individual rates in these . . . cases may be high, but they are balanced by the low fee awards (or no fee awards) in other cases." In rejecting that contention, this court concluded that the plaintiffs were "essentially asking victorious claimants to 'subsidize' the claims of losing claimants" by "tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants." *Id.* at 1171. Plaintiffs' argument is, at bottom, the argument that this court rejected in *Straw*.

Finally, Plaintiffs argue that the *Miller* and *Anderson* courts did not explain adequately their refusal to increase the lodestar fees based on the contingent-fee agreements.

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[3] Plaintiffs do not argue that any of these four cases was particularly risky on an individual basis.

That argument, too, is foreclosed by this court's cases. Although a district court must *consider* a plaintiff's request to increase a fee on this basis, *Allen*, 48 F.3d at 460, a court "is not required to articulate its reasons" for accepting or rejecting such a request, *Widrig*, 140 F.3d at 1211.

II. ARGUMENT SPECIFIC TO *MILLER*

Finally, Plaintiffs argue that the *Miller* court failed to explain its conclusions adequately. Plaintiffs rely in part on *Jordan v. Multnomak County*, 815 F.2d 1258, 1263 (9th Cir. 1987), which reversed an award of attorney fees because the record contained no basis for the amount awarded. Ralph Wilborn made the same argument in *Widrig*. *See* 140 F.3d at 1210. In rejecting the argument, the *Widrig* court gave some guidance as to how detailed a district court's order must be:

> However, unlike *Jordan*, the district court in the instant cases did make findings regarding the sufficiency of the evidence submitted by appellants and explained the reasons for its conclusions. The court found that the Johnson and Brewer affidavits were insufficient to support an hourly rate of $200. In Widrig's case, it also reasoned that counsel had recently been awarded fees at an hourly rate of $175, further justifying $175 as a reasonable lodestar rate. Thus, there was no abuse of discretion.

Id.

So too here. The magistrate judge found (1) that Plaintiffs' affidavits were insufficient to establish that their requested rate was the appropriate rate; (2) that the

case was neither complex nor novel; (3) that the amount of time that Plaintiffs had expended on the case, while reasonable, was "more than would be expected of practitioners claiming the right to increased hourly rates based on increased knowledge of and specialization in the social security area"; and (4) that Tim and Ralph Wilborn recently had been awarded hourly fees of $125 and $150, respectively, in a Portland Social Security case. The district court adopted the magistrate judge's findings and recommendations, with some elaboration.

Thus, the district court's order, taken together with the magistrate judge's findings and recommendations, contained findings and explanations comparable to those that this court approved in *Widrig*. As in *Widrig*, we conclude that the order was sufficiently detailed. The district court did not abuse its discretion.

CONCLUSION

For the reasons stated, we conclude that the district courts did not abuse their discretion and affirm the awards of attorney fees in all four of these cases.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD ANDERSON, Plaintiff, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	)	Case No. 96-6311-HO ORDER (Filed Sep. 29, 1999)

This matter is before the court on plaintiff's motion (#31) for attorney's fees pursuant to 42 U.S.C. §406(b).

BACKGROUND

Pursuant to the judgment in this action, filed in January, 1998, the Commissioner's decision was reversed and remanded for additional proceedings, where benefits were awarded. Plaintiff's attorney spent 57.22 hours related to this action, and is now seeking $10,013.50, i.e. $175.00 per hour, in attorney's fees.

SUMMARY OF PARTIES ARGUMENTS

Plaintiff argues that his attorney, Tim Wilborn, should be awarded $175.00 per hour for his services. 42 U.S.C. §406(b) allows the court to award attorney's fees up to 25% of plaintiff's retroactive benefits. Plaintiff argues that $175.00 per hour, or 7.8% of the retroactive

benefits, is a reasonable fee. Defendant argues that market rates establish that $125.00 per hour is a reasonable fee.

DISCUSSION

Section 406(b) of the Social Security Act provides that a court may award attorney's fees in a civil action brought to recover past-due benefits under Title II of the Act. 42 U.S.C. §406(b)(1). The maximum amount allowable is 25% of the total past-due benefits. 42 U.S.C. §406(b)(1). The fees are payable "out of, and not in addition to" the award of benefits. *Id.*

In establishing the proper attorney's fees under the Social Security Act, a court begins with the Supreme Court's directive that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Starr v. Bowen*, 831 F.2d 872, 873 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)); *see also Greater Los Angeles Council on Deafness v. Community Television of S. Calif.*, 813 F.2d 217, 221 (9th Cir. 1987).

This "lodestar" amount is the predominant element of the analysis. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987). However, the court may adjust the fee by considering the following twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or

contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *see also Hensley*, 461 U.S. at 434 n.9.

Plaintiff contends that the requested rate of $175.00 per hour is appropriate because plaintiff was represented pursuant to a contingency fee contract and because the fees are within the parameters set by the Social Security Act. Alternatively, plaintiff argues that this court previously found a $175.00 per hour fee reasonable for Tim Wilborn, and thus should again award him this hourly rate.

While the contingent nature of a contract is one factor that the district court should consider and may, if it chooses, factor into its determination of a reasonable fee, it must not be used to subsidize the claims of losing plaintiffs by inflating the fees of winning plaintiffs. *Allen v. Shalala*, 48 F.3d 456, 459-460 (9th Cir. 1994). Further, the cases plaintiff cites to demonstrate that Tim Wilborn has previously been awarded $175.00 per hour by this court, *Blair v. Chater*, No. 95-6135-HA (D.Or.), and *Widrig v. Chater*, No. 94-6503-TC (D.Or.), do not support his argument.

In *Blair*, the court awarded fees in a lump sum without mention of an hourly rate. In *Widrig*, both Ralph Wilborn and Tim Wilborn were awarded hourly fees of $175.00. However, the majority of the hours billed were

for work done by Ralph Wilborn, a more experienced attorney specializing in social security disability cases.

This court, upon review of the record, consideration of the above mentioned factors, and review of this district's reasonable hourly fee awards in social security cases for attorneys of comparable skill, reputation and experience, finds that this case was not an unusually complex social security disability claim and therefore an hourly rate of $150.00 is reasonable compensation. Thus, the lodestar amount is 57.22 hours multiplied by $150.00 per hour, or $8,583.00.

An attorney for a social security claimant may apply for attorney's fees under both 42 U.S.C. §406 and the EAJA. However, if fees are awarded under both statutes, he must reimburse the claimant the smaller of the two amounts. *See Freedle v. Bowen*, 674 F.Supp. 799, 801 (D.Nev. 1987) (citing H.R. Rep. No. 99-102, 99th Cong., 1st Sess. 20, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 148-49). Here the award under 42 U.S.C. §406 ($8,583.00) is greater than the $5,866.84 EAJA award already recovered. Thus, $5,866.84 must be subtracted from $8,583.00 for a total of $2716.16 to be paid from plaintiff's retroactive benefits.

CONCLUSION

For the reasons noted above, plaintiff's motion for attorney's fees (#31) is granted to the extent that an attorney's fee of $2716.16 is authorized to be paid from the past-due benefits of plaintiff.

IT IS SO ORDERED.

DATED this 28th day of September, 1999.

/s/ Michael R. Hogan
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GARY GISBRECHT, Plaintiff, vs. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	)	Civil No. 98-437-RE ORDER (Filed Apr. 14, 1999)

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REDDEN, Judge:

On November 18, 1998, the court entered an order awarding fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"), in the amount of $3,339.11. Claimant's counsel now moves the court for an award under 42 U.S.C. § 406(b)(1)(A) in the amount of $7,091.50, to be offset by the amount already awarded

under the EAJA. The Commissioner opposes the motion. The court awards fees in the amount of $3,135.00.

STANDARDS

Section 406(b)(1)(A) of the Social Security Act provides:

> Whenever a court renders a favorable judgment to a claimant . . . who was represented before the court by an attorney, the court may . . . allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total past-due benefits to which the claimant is entitled. . . .

An award of fees under both the EAJA and § 406(b)(1)(A) does not amount to double recovery for the attorney, because the attorney must give the smaller of the two awards to his client to compensate for his litigation costs. *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991).

However, § 406(b)(1) is not a fee-shifting statute. *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989). Instead, it is a "*parens patriae* limit on the amount of fees an attorney may receive from a disability claimant." *Id.* While Congress did intend to "ensure that attorneys would receive some fees for their representation," *id.*, the disability award from which the attorney's fee is paid "is normally an already-inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr v. Bowen*, 831 F.2d 872, 873 (9th Cir. 1987), *quoted in Allen v. Shalala*, 48 F.3d 456, 458-59 (9th Cir. 1995).

Keeping these factors in mind, the court is required to calculate reasonable attorney's fees based on the lodestar method. *Allen*, 48 F.3d at 459. Under this method, the court first determines a reasonable hourly rate. The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those of lawyers of reasonably comparable skill, experience, and reputation. *Straw*, 866 F.2d at 1169, *citing Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984).

The court multiplies the rate by the number of hours reasonably expended on the litigation to arrive at a presumptively reasonable fee. The fee may then be adjusted by considering, among other things, the fact that the attorney accepted employment on a contingency basis. *Allen*, 48 F.3d at 458. However, the court is not to treat a contingent fee arrangement as presumptively fair and reasonable; the district court "does not sit to approve routinely a contingent fee contract between social security claimants and their counsel." *Id., quoting from Starr*, 831 F.2d at 874.

DISCUSSION

Counsel requests a fee award in the amount of $7,091.50 or 25% of claimant's retroactive benefits, the maximum which may be awarded under § 406(b)(1). Counsel asserts that he expended 25.08 hours on this case; representation was limited because the Commissioner conceded liability and stipulated to a remand for an award of benefits. The requested amount of $7,091.50 represents $283.64 per hour. In the alternative, counsel

requests that he be awarded at least $175.00 per hour, or $4,389.00.

Counsel asserts that obtaining from the Commissioner an agreement to stipulate to a remand for benefits was an extraordinary result which entitles him to an enhanced fee. Counsel argues that the issues raised in claimant's opening brief were both factually and legally intensive, and that the brief contained critical issues which might have been overlooked by a less experienced practitioner. I disagree.

The issue in this case was whether claimant, whom the ALJ found disabled for a closed period from August 27, 1993 through January 31, 1996, had a continuing disability after January 31, 1996. Counsel argued in the opening brief that the ALJ 1) misconstrued the medical evidence to support a finding that claimant had improved medically; 2) failed to consider claimant's impairments in combination; 3) improperly rejected claimant's testimony; and 4) failed to include a limitation in the hypothetical question to the vocational expert.

I have reviewed the claimant's opening brief and find nothing particularly difficult, complex or novel about the issue involved or the arguments made; the legal analysis and the cases cited are standard in Social Security claimants' briefs. The fact that the Commissioner conceded the case and stipulated to the award of continuing disability benefits suggests to me, not that the briefing was difficult or complex, but rather that the evidence so strongly favored the claimant that the Commissioner wisely declined to contest the case. This cannot necessarily [sic]

attributed to extraordinary advocacy skills, and does not necessarily justify an hourly rate of almost $300 an hour.

Counsel has submitted affidavits asserting that the prevailing rate in the community for Social Security cases is 25% of past due benefits. This evidence is unpersuasive. The statutory maximum of 25% of past due benefits is not routinely awarded in this court and carries no presumption of reasonableness. See *Straw*, 866 F.2d at 1170 (court declines to award full 25% if resulting hourly rate would be unreasonable). The Commissioner has submitted a recent survey by the Oregon State Bar, published in the monthly bulletin of the Bar, showing that the average billing rate for attorneys in private practice with 4-6 years of experience in the county where counsel practices is $89.00 an hour. Claimant's counsel has practiced law less than five years; while a specialty in Social Security cases has no doubt conferred substantial expertise in this area, I am not persuaded that almost $300 an hour is a reasonable fee for a relatively recent admittee to the bar. I find that $125.00 an hour is a reasonable fee.

The contingency factor does have some bearing on this hourly rate; the risk of nonpayment is a factor to be considered in adjusting the lodestar figure. *Straw*, 866 F.2d at 1170. But although the court should consider the contingency basis of counsel's employment, it should not "unquestioningly approve the amount negotiated by the parties." *Id.* at 1169. District courts have been admonished that they cannot use the contingency factor to subsidize the claims of losing claimants, because to do so is "fundamentally unfair to the claimants who depend upon

back benefit recoveries," and is also "contrary to congressional intent to protect claimants by limiting fee awards." *Allen*, 48 F.3d at 460.

In *Widrig v. Apfel*, 140 F.3d 1207, 1210 (9th Cir. 1998), the court approved a decision not to enhance a fee for contingency when there is no evidence that the case is unusually risky. I can find nothing risky in this particular case – in fact, the record suggests that claimant's winning was more of a sure thing than usual – and therefore decline to enhance the fee award on the basis of a contingent fee agreement between counsel and the claimant.

After balancing the need to make the attorney's compensation sufficient to encourage members of the bar to undertake representation of disability claimants with the meagerness of the claimant's Social Security stipend, and applying an hourly rate of $125 per hour for Tim Wilborn to the 25.08 hours expended on this case, the court concludes that a reasonable fee under 42 U.S.C. § 406(b)(1) is $3,135.00.

Pursuant to 42 U.S.C. § 406(b)(1), claimant is awarded attorney fees in the amount of $$3,135.00.

IT IS SO ORDERED.

Dated this 14 day of April, 1999.

/s/ James A. Redden
James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARBARA A. MILLER, Plaintiff, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	Civil No. 96-6164-AS OPINION AND ORDER (Filed Mar. 30, 1999)

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FRYE, Judge:

The Honorable Donald C. Ashmanskas, United States Magistrate Judge, filed his Findings and Recommendation on January 15, 1999, regarding plaintiff's attorney fees in this Social Security case. He reduced the hourly rate requested by plaintiff's two attorneys by $50.00 an hour. The attorneys filed their objections on January 28, 1999. The Social Security Administration has not filed a response.

There are five objections:

1. Does Koser apply?

Magistrate Judge Ashmanskas stated that he adopted the reasoning and conclusions of the Honorable James A. Redden, United States District Judge, as set forth in *Koser v. Callahan*, Civil No. 96-6244-RE (November 14, 1997). Judge Redden found that a reasonable hourly rate for attorney Ralph Wilborn was $150.00 an hour, and that a reasonable hourly rate for attorney Tim Wilborn was $125.00 an hour. Plaintiff contends that *Koser* neither pertains to the instant case, nor controls the attorney fee award because the attorneys' affidavits were the only evidence presented to the *Koser* court, whereas the attorneys in this case have provided affidavits from other attorneys, their own affidavits, and extensive time sheets showing that they have been previously paid the hourly rates that they requested here. While plaintiff's attorneys have provided much more evidence than was provided in *Koser*, an award of attorney fees pursuant to 42 U.S.C. § 406(b) is discretionary with the court. The standard is that the court "*may*" award up to twenty-five percent of plaintiff's retroactive benefits. The twenty-five percent of

plaintiff's retroactive benefits that the court may award is a *maximum* amount; it is not a requirement. Even with the additional evidence that plaintiff's attorneys presented to Magistrate Judge Ashmanskas, it is still within his discretion to award the hourly fee he believes is reasonable.

2. Is plaintiff's age relevant?

Plaintiff decries the fact that Magistrate Judge Ashmanskas made reference to her age. When Magistrate Judge Ashmanskas found that the case was neither complex nor novel with regard to its legal and factual issues, he noted that plaintiff's counsel had argued that she was a college-educated, younger individual, when she was actually fifty years old at the time the case was before the court and had attended bookkeeping school for only three to four months. Plaintiff contends that her age has no bearing on the merits of the case. It appears to this court that Magistrate Judge Ashmanskas was pointing out that plaintiff's counsel had bent the facts slightly in order to gain support for plaintiff's attorney fees request.

3. Was the evidence presented sufficient for the requested attorney fees?

Plaintiff's counsel provided sufficient evidence to support an award of attorney fees. The amount of attorney fees to be awarded is discretionary, provided that the determination is no more than twenty-five percent of plaintiff's award of retroactive Social Security benefits. Magistrate Judge Ashmanskas awarded as attorney fees little more than eighteen percent of plaintiff's retroactive

Social Security benefits as attorney fees. Magistrate Judge Ashmanskas was within legal boundaries in so doing.

4. Was it error for Magistrate Judge Ashmanskas to fail to address the contingency enhancement argument?

Plaintiff seeks consideration by this court of her argument for a contingency enhancement because Magistrate Judge Ashmanskas did not address the issue of a contingency enhancement at all. In *Allen v. Shalala*, 48 F.3d 456 (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit requires the district court to consider contingency arguments. It is still within the district court's discretion to disregard the contingency argument, but it appears that the Court of Appeals wants *some* consideration of the issue.

After careful review and consideration of the record in this case, including plaintiff's contingency argument as presented in the Plaintiff's Memorandum in Support of Motion for Approval of Attorneys' Fees Pursuant to 42 U.S.C. § 406(b), the Findings and Recommendation of Magistrate Judge Ashmanskas is AFFIRMED. This court cannot provide "some guidance" to avoid this reduction of attorney fees as requested by plaintiff because the issue of attorney fees is discretionary in each case.

IT IS SO ORDERED.

DATED this 30 day of March, 1999.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARBARA MILLER, Plaintiff, vs. JOHN J. CALLAHAN, Acting Commissioner, Social Security Administration, Defendant.	Civil No. 96-6164-AS FINDINGS AND RECOMMENDATION (FILED 1999 JAN 15)

ASHMANSKAS, Magistrate Judge:

On December 29, 1997, this court entered an order awarding fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412 ("EAJA") in the amount of $5,164.75 and $80.42, respectively. Plaintiff's counsel now moves the court for an award under 42 U.S.C. §406(b)(1)(A) in the amount of $7,514.00, to be offset by the amount already awarded under the EAJA. The requested amount represents 39.91 hours of time expended by plaintiff's counsel at an hourly rate of $188.27. Defendant does not object to the claimed number of hours, although it does allude to the figure being high with regard to counsels' alleged expertise, but does contest the reasonableness of the requested hourly rate.

BACKGROUND

Plaintiff filed this action requesting this court to reverse the Commissioner's decision that she is not disabled. After a thorough review of the administrative record and the briefing by the parties, this court determined the final decision of the Commissioner was in error in that the Administrative Law Judge failed to properly consider plaintiff's stress intolerance, improperly discounted a physician's opinion and improperly rejected plaintiff's and a lay witness's testimony. This court held that the final decision was not supported by substantial evidence in the record, reversed the decision of the Commissioner and awarded benefits to plaintiff.

LEGAL STANDARD

Section 406(b)(1)(A) of the Social Security Act provides:

> Whenever a court renders a favorable judgment to a claimant * * * who was represented before the court by an attorney, the court may * * * allow as part of its judgment a reasonable fee for such representation, not in excess of 25% of the total past-due benefits to which the claimant is entitled * * * . In case of any such judgment, no other fee may be payable * * * for such representation except as provided in this paragraph.

An award of fees under both the EAJA and Section 406(b)(1)(A) does not amount to double recovery for the attorney. *Russell v. Sullivan*, 930 F.2d 1443, 146 (9th Cir. 1991). The award under Section 406(b) "merely allows the claimant's attorney to collect his or her fee out of the

claimant's past-due disability benefits, while the EAJA award is paid by the government to the claimant to defray the cost of legal services." *Id.* The dual fee awards are proper as long as the attorney gives the smaller of the two awards to his client to compensate her for litigation costs. *Id.*

However, Section 406(b)(1) is not a fee-shifting statute. *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989). The purpose of the statute was to limit contingency awards which "often resulted in an inordinate deprivation of benefits otherwise payable to the client." *Id.* (quoting *Watford v. Heckler*, 765 F.2d 1562, 1566 (11th Cir. 1985)). Congress also intended to ensure that attorneys receive some fees for representation. *Id.* Despite the existence of a negotiated contingency fee agreement, this court is charged with making its own inquiry into the reasonableness of the fee request. *Straw*, 866 F.2d at 1169. The court should recognize that the fee award is paid from an "already inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr v. Bowen*, 831 F.2d 872, 873 (9th Cir. 1987).

Keeping these factors in mind, the court is required to calculate reasonable attorney's fees based on the lodestar method. *Allen v. Shalala*, 48 F.3d 456, 459 (9th Cir. 1995). Under this method, the court first determines a reasonable hourly rate. The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those lawyers of reasonably comparable skill, experience and reputation. *Straw*, 866 F.2d at 1169, citing *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984).

The court multiplies the rate by the number of hours reasonably expended on the litigation to arrive at a presumptively reasonable fee. The fee may be adjusted by considering, among other things, the fact that the attorney accepted employment on a contingency basis. *Allen*, 48 F.3d at 458. However, as noted above, the court is not to treat a contingent fee arrangement as presumptively fair and reasonable. *Id.*

DISCUSSION

In this instance, counsel requests a fee award equal to 25% of plaintiff's retroactive benefits, the maximum which may be awarded under Section 406(b)(1). Counsel asserts that the reasonable billing rates are $200 per hour for Ralph Wilborn (36.41 hours) and $175 per hour for Tim Wilborn (3.5 hours), for an actual total of $7,894.50.

Plaintiff's counsel argues that the underlying case was not a routine case in that plaintiff was a college educated, younger individual, that the issues raised were factually intensive and were sufficiently complex to require skilled counsel. However, review of the record reveals that plaintiff was 50 years at the time the case was before the court and that plaintiff had received her high school diploma and attending [sic] bookkeeping school for 3 or 4 months. The plaintiff suffered from congestive heart failure, depression, diabetes and obesity. All of these conditions are straightforward and well known among the social security bar. Finally, the issues presented to the court (failure to properly consider plaintiff's stress intolerance, improperly discounting a physician's opinion and improperly rejecting plaintiff's and a lay

witness's testimony) are hardly unique and do not qualify as complex issues. The court finds that the case was neither complex nor novel with regard to its legal and factual issues, and the result was [sic] obtained by counsel was not exceptional or rare.

The court finds that the amount of time expended in this matter, while reasonable, is more than would be expected of practitioners claiming the right to increased hourly rates based on increased knowledge of and specialization in the social security area. Additionally, the court finds that the evidence presented by plaintiffs counsel, that 25% of the retroactive benefits is the market rate for federal court representation of social security claimants, is insufficient evidence to support a finding that the requested rates are in line with those lawyers of reasonably comparable skill, experience and reputation, as required by *Straw*.

The court adopts the reasoning and conclusions of Judge Redden, as set forth in *Koser v. Callahan*, CV No. 96-6244-RE (November 14, 1997), and finds that a reasonable hourly rate for the legal services of Ralph Wilborn in this matter is $150 and that a reasonable hourly rate for Tim Wilborn is $125. Accordingly, the court finds a reasonable fee under Section 406(b)(1) is $5,461.50.

CONCLUSION

Plaintiff's motion (# 42) for attorney fees under Section 406(b)(1) should be allowed in the amount of $5,461.50.

DATED this 15th day of January, 1999.

/s/ Donald C. Ashmanskas
DONALD C. ASHMANSKAS
United States Magistrate Judge

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due February 2, 1999. If no objections are filed, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than February 16, 1999. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NANCY SANDINE, Plaintiff, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	)	CV-97-6197-ST FINDINGS AND RECOMMENDATION (Filed Jun. 18, 1999)

STEWART, Magistrate Judge:

INTRODUCTION

Claimant, Nancy Sandine, brings this action pursuant to the Social Security Act, 42 USC § 405(g), to obtain judicial review of a final decision of the Commissioner of the Social Security Administration ("the Commissioner"). Pursuant to a judgment entered April 13, 1998, the Commissioner's decision was reversed and remanded for payment of benefits (docket #16). A Supplemental Judgment entered on July 31, 1998 (docket #26) awarded plaintiff $6,836.10 for attorney fees (based on $130.46 per hour times 52.40 hours) and $253.16 for costs under the Equal Access to Justice Act, 28 USC § 2412(d) ("EAJA").

Plaintiff now moves the court for an award of attorney fees under 42 USC § 406(b)(1)(A) in the amount of $13,988.00, or 25% of plaintiff's retroactive benefits, to be offset by the amount already awarded under the EAJA (docket # 27). The requested amount, divided by 52.40

hours, results in an hourly rate of $266.94. Defendant does not object to the claimed number of hours, but contests the reasonableness of the requested hourly rate. For the reasons set forth below, plaintiff's request should be granted in the sum of $6,550.00.

LEGAL STANDARD

Section 406(b)(1)(A) of the Social Security Act provides that:

> Whenever a court renders a favorable judgment to a claimant . . . who was represented before the court by an attorney, the court may . . . allow as part of its judgment a reasonable fee for such representation, not in excess of 25% of the total past-due benefits to which the claimant is entitled . . . In case of any such judgment, no other fee may be payable . . . for such representation except as provided in this paragraph.

An award of fees under both the EAJA and Section 406(b)(1)(A) does not amount to double recovery for the attorney. *Russell v. Sullivan*, 930 F2d 1443, 146 [sic] (9th Cir 1991). The award under Section 406(b)(1)(A) "merely allows the claimant's attorney to collect his or her fee out of the claimant's past-due disability benefits, while the EAJA award is paid by the government to the claimant to defray the cost of legal services." *Id.* The dual fee awards are proper as long as the attorney gives the smaller of the two awards to his client to compensate her for litigation costs. *Id.* The claimant is then responsible for paying her attorney the difference between the two awards.

Section 406(b)(1) is not a fee-shifting statute. *Straw v. Bowen*, 866 F2d 1167, 1169 (9th Cir 1989). The purpose of

the statute was to limit contingency awards which "often resulted in an inordinate deprivation of benefits otherwise payable to the client." *Id*, quoting *Watford v. Heckler*, 765 F2d 1562, 1566 (11th Cir 1985). Congress also intended to ensure that attorneys receive some fees for representation. *Id.* Despite the existence of a negotiated contingency fee agreement, this court is charged with making its own inquiry into the reasonableness of the fee request. *Id.* The court should recognize that the fee award is paid from an "already inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr v. Bowen*, 831 F2d 872, 873 (9th Cir 1987).

Keeping these factors in mind, the court is required to calculate reasonable attorney's fees based on the lodestar method. *Allen v. Shalala*, 48 F3d 456, 459 (9th Cir 1995). Under this method, the court determines a reasonable hourly rate, and then multiplies that rate by the number of hours reasonably expended on the litigation. The court may then adjust that lodestar amount by considering the twelve factors in *Kerr v. Screen Extras Guild, Inc.*, 526 F2d 67 70 (9th Cir 1975). *Allen*, 48 F3d at 458. Those factors include whether the fee is fixed or contingent. However, the court is not to treat a contingent fee arrangement as presumptively fair and reasonable. *Id.*

DISCUSSION

In this instance, counsel requests a fee award of $13,988.00, which is 25% of plaintiff's retroactive benefits, the maximum which may be awarded under Section 406(b)(1). Because counsel expended 52.40 hours, this requested amount is equal to $266.94 per hour. In the

alternative, counsel submits that at least $175.00 per hour is reasonable and should be awarded. The Commissioner objects, contending that a reasonable hourly rate is $125.00 per hour.

A. Hourly Rate

The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those lawyers of reasonably comparable skill, experience and reputation. *Straw,* 866 F2d at 1169, citing *Blum v. Stenson,* 465 US 886, 896 n 11 (1984). Plaintiff's counsel, Tim Wilborn, graduated from law school and became admitted to the Oregon State Bar in 1994. He is an associate with Ralph Wilborn and Etta L. Wilborn, P.C. in Eugene, Oregon, but works in an office in downtown Portland. He limits his law practice to Social Security appeals and takes all cases strictly on a contingency fee basis set at 25% of a claimant's retroactive benefits. Although he also claims that his "current federal court contract provides for a fee of $250.00 per hour," plaintiff's Employment Agreement with her attorney makes no reference to $250.00 per hour. Affidavit of Tim Wilborn, p. 3; Plaintiff's Exhibit C.

Plaintiff argues that the lodestar should be at least $175.00 per hour before considering a contingency enhancement. To support an hourly rate of $175.00, counsel relies in part on *Widrig v. Apfel,* 140 F3d 1207, 1209 (9th Cir 1998), which affirmed attorney fee awards by Judges Hogan and Frye in two Social Security Disability cases based upon $175.00 per hour, rather than the requested

hourly rate of $200.00.[1] *Widrig* was based in part upon the lack of evidence to establish a prevailing market rate of more than $150.00 per hour charged for similar services by an attorney with 20 years experience in Social Security matters.

To remedy the deficiency of evidence in *Widrig,* plaintiff submits three affidavits in this case in an attempt to establish a prevailing market rate. Peter S. Young is a San Francisco attorney with 16 years of experience and is familiar with the general practices of attorneys in his region. His affidavit states that Social Security Disability attorneys nearly always use contingency fee contracts for 25% of the claimant's retroactive benefits; most attorney fee contracts specify that the maximum fee is a set dollar amount that is typically $4,000.00 for representation during proceedings before the Social Security Administration; and even with this upper fee limit, the typical recovery based on time expended for a successful case averages substantially above $250.00 per hour. He thus concludes that the market rate is simply 25% of the claimant's retroactive benefits. Eric Schnaufer, a Chicago attorney, and Bruce Brewer, a Washington attorney, both with several years experience in Social Security Disability cases, confirm Mr. Young's statements and also conclude that there is no true market rate other than the contingency fee of 25% of a claimant's retroactive benefits.

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[1] Although Tim Wilborn is not mentioned by name in *Widrig,* plaintiff contends that the affidavits submitted in that case establish that he expended a significant part of the time therein. This court accepts plaintiff's representation in that regard.

Because attorneys with "reasonably comparable skill, experience and reputation" in Social Security Disability cases charge a contingency fee and do not use the hourly billing method, plaintiff's counsel concedes that he cannot produce evidence of an hourly rate as the prevailing market rate. Instead, he argues that the appropriate standard to truly put him on a par with his peers is the 25% contingency fee. This argument is unavailing.

Although plaintiff relies upon *Widrig* and *Blair v. Chater*, CV No. 95-6135-HA (December 4, 1996), both of which awarded attorney fees based upon $175.00 per hour, Judge Redden recently noted in *Gisbrecht v. Apfel*, CV No. 98-437-RE (April 14, 1999), that the statutory maximum of 25% of past due benefits is not routinely awarded in this court and carries no presumption of reasonableness. In *Gisbrecht*, Judge Redden awarded attorney fees of $3,135.00 based upon an hourly rate of $125.00 for Tim Wilborn. Similarly, two other recent decisions in this court have awarded Tim Wilborn the lower hourly rate of $125.00. *Koser v. Callahan*, CV No. 96-6244-RE, Opinion by Judge Redden dated November 14, 1997 (awarding fees of $6,015.75); *Miller v. Apfel*, CV No. 96-6164-AS, Finding and Recommendation by Magistrate Judge Ashmanskas dated February 26, 1999, adopted by Judge Frye on March 30, 1999 (awarding fees of $5,461.50).

Furthermore, the Commissioner has submitted the Oregon State Bar 1998 Economic Survey, which shows that attorneys in private practice with four to six years of experience in Portland have an average billing rate of $120.00 an hour and a median billing rate of $125.00 an

hour.[2] While a specialty in Social Security Disability cases has no doubt confers [sic] substantial expertise in this area upon counsel, this court is not persuaded that $175.00 is a reasonable fee for a relatively recent admittee to the Oregon State Bar.

As have Judges Redden, Ashmanskas, and Frye, this court concludes that a reasonable hourly rate for Tim Wilborn is $125.00 per hour.

B. Adjustments to the Lodestar

To obtain an upward adjustment in the lodestar, plaintiff's counsel first argues that the underlying case was not a routine case in that the issues raised were factually intensive and were sufficiently complex to require skilled counsel. However, the issues presented to the court (improperly rejecting a physician's assessments, failing to apply the grids set forth in 20 CFR § 404, subpt. P, app. 2, and improperly rejecting plaintiff's and lay witnesses' testimony) are hardly unique and do not qualify as complex issues. The court finds that the case was neither complex nor novel with regard to its legal and factual issues, and the result obtained by counsel was not exceptional or rare.

Plaintiff also seeks an upward adjustment for the contingency nature of the counsel's representation, as well as upon the customary contingency fee of 25% of the retroactive benefits. The contingency factor, based upon

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[2] In its Memorandum, the Commissioner mistakenly relied on the lower billing rates in the survey for attorneys in the Lower Willamette Valley.

the risk of nonpayment, is a factor to be considered in adjusting the lodestar figure. Although the court should consider the contingency basis of an attorney's employment, it should not "unquestioningly approve the amount negotiated by the parties." *Straw*, 866 F2d at 1169. District courts have been admonished that they cannot use the contingency factor to subsidize the claims of losing claimants, because to do so is "fundamentally unfair to the claimants who depend upon back benefit recoveries," and is also "contrary to congressional intent to protect claimants by limiting fee awards." *Allen*, 48 F3d at 460. The 25% contingency fee may be a maximum, but cannot be viewed as a minimum for the purpose of awarding a reasonable fee.

After balancing the need to make the attorney's compensation sufficient to encourage members of the bar to undertake representation of disability claimants with the meagerness of the claimant's Social Security benefits, and applying an hourly rate of $125.00 per hour for Tim Wilborn to the 52.40 hours expended on this case, the court concludes that a reasonable fee under 42 USC § 406(b)(1) is $6,550.00.

RECOMMENDATION

Plaintiff's motion (docket # 27) for attorney fees under Section 406(b)(1)(A) should be granted in the amount of $6,550.00.

SCHEDULING ORDER

Objections to these Findings and Recommendation, if any, are due July 6, 1999. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due no later than July 23, 1999. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

Dated this 16th day of June, 1999.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate
Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY E. GISBRECHT, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant-Appellee.	No. 99-35496 D.C. No. CV-98-00437-JAR

BARBARA A. MILLER, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant-Appellee.	No. 99-35497 D.C. No. CV-96-06164-DCA

NANCY SANDINE, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant-Appellee.	No. 99-36038 D.C. No. CV-97-06197-JMS

DONALD L. ANDERSON, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant-Appellee.	No. 99-36131 D.C. No. CV-96-06311-MRH ORDER (Filed April 20, 2001)

Before: HALL, RYMER, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and Graber have voted to deny the petition for rehearing en banc, and Judge Hall has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DONALD ANDERSON, Plaintiff, vs. **KENNETH S. APFEL,** Commissioner, Social Security Administration Defendant.	CV 96-6311-HO AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b).

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I represented Plaintiff during the federal court proceedings in this matter. I make this Affidavit in support of PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b). As a result of my representation of

Plaintiff in this matter, pursuant to JUDGMENT of this court, filed 1/5/98, the Commissioner's decision was reversed and remanded for further proceedings, and I won the case on remand, by ALJ decision dated 11/25/98.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer. As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon and the bars of the U.S. District Court for the State of Oregon and the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since 1994, apart from representing claimants in agency proceedings, I have represented numerous claimants before the U.S. District Court for the District of Oregon and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and in briefing. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

My current federal court contract provides for a fee of 25% of the claimant's past-due benefits. In *Crain v. Apfel*, Civ. No. 96-6326-HO and *Miller v. Apfel*, Civ. No. 97-6060-HO, the court approved an hourly rate of $150.00 for the undersigned's services. Previously, this court has awarded me fees at the rate of $175.00 per hour. See *Blair v. Chater*, Civ. No. 95-6135-HA, in which I asked for and received fees in the amount of $175.00 per hour, pursuant to 42 U.S.C. § 406(b). The Commissioner did not oppose the reasonableness of the award of fees in *Blair*. See also *Widrig v. Apfel*, ___ F.3d ___, 1998 WL 156526 (9th Cir. 1998) (upholding district court's finding that $175.00 per hour is a reasonable rate for my services).[1]

I am far more experienced in federal court litigation than I was at the time I wrote the *Blair* or *Widrig* briefs, and I believe a reasonable hourly rate for my federal court services is now at least $250.00, considering the prevailing rate in the Eugene, Medford, and Portland

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[1] In *Widrig*, I had requested a lodestar of only $150.00 per hour, but the Commissioner argued, and the court found, that $175.00 per hour was a more reasonable hourly lodestar.

communities for similar services by lawyers of reasonably comparable skill, experience and reputation, considering the contingent nature of the representation, and considering my special expertise.

The attached Plaintiff's Schedule A is a printout of my law firm's contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto.

DATED this 15th day of July, 1999

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this day, July 15, 1999.

/s/ Amy Evenson
NOTARY PUBLIC FOR
OREGON

[SEAL] OFFICIAL SEAL
AMY EVENSON
NOTARY PUBLIC-OREGON
COMMISSION NO. 057310
MY COMMISSION EXPIRES SEPT. 3, 2000

RALPH WILBORN, ATTORNEY AT LAW, OSB #84104
TIM WILBORN, ATTORNEY AT LAW, OSB #94464
Ralph Wilborn and Etta L. Wilborn, P.C.
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

GARY GISBRECHT, Plaintiff, vs. **KENNETH S. APFEL**, Commissioner, Social Security Administration Defendant.	)	CV 98-437-RE AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b).

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I represented Plaintiff during the federal court proceedings in this matter. I make this Affidavit in support of PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b). As a result of my representation of

Plaintiff in this matter, pursuant to ORDER of this court, filed 10/16/98, the Commissioner's decision was reversed and remanded for payment of benefits, upon stipulation of the parties.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer. As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon and the bars of the U.S. District Court for the State of Oregon and the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since 1994, apart from representing claimants in agency proceedings, I have represented numerous claimants before the U.S. District Court for the District of Oregon and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and in briefing. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

I am aware of no Oregon attorneys, other than myself, Ralph Wilborn, and Kathryn Tassinari, who appeal to federal court Social Security cases where the claimant was unsuccessfully represented by another attorney during agency proceedings. This is attributable largely to the fact that federal court review of agency decisions has a dismal success rate. Such attorneys may exist, but if they do, they are scarce, and claimants who have such cases face substantial difficulties in finding federal court counsel in the local or other relevant market.

My current federal court contract provides for a fee of $250.00 per hour or 25% of the claimant's past-due benefits. Thus, my hourly rate currently is $250.00 per hour. Previously, this court has awarded me fees at the rate of $175.00 per hour. See *Blair v. Chater*, Civ. No. 95-6135-HA, in which I asked for and received fees in the amount of $175.00 per hour, pursuant to 42 U.S.C. § 406(b). The Commissioner did not oppose the reasonableness of the award of fees in *Blair*. See also *Widrig v. Apfel*, ___ F.3d ___, 1998 WL 156526 (9th Cir. 1998)

(upholding district court's finding that $175.00 per hour is a reasonable rate for my services).[1]

I am far more experienced in federal court litigation than I was at the time I wrote the *Blair* or *Widrig* briefs, and I believe a reasonable hourly rate for my federal court services is now at least $250.00, considering the prevailing rate in the Eugene, Medford, and Portland communities for similar services by lawyers of reasonably comparable skill, experience and reputation, considering the contingent nature of the representation, and considering my special expertise.

The attached Plaintiff's Schedule A is a printout of my law firm's contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto.

DATED this day, February 4, 1999.

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this day, February 4, 1999.

/s/ Amy Evenson
NOTARY PUBLIC FOR
OREGON

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[1] In *Widrig*, I had requested a lodestar of only $150.00 per hour, but the Commissioner argued, and the court found, that $175.00 per hour was a more reasonable hourly lodestar.

[SEAL] OFFICIAL SEAL
AMY EVENSON
NOTARY PUBLIC-OREGON
COMMISISON NO. 057310
MY COMMISSION EXPIRES SEPT. 3, 2000

RALPH WILBORN, ATTORNEY AT LAW
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARBARA A. MILLER, Plaintiff, vs. **KENNETH S. APFEL,** Commissioner, Social Security Administration, Defendant.	)	C.V. 96-6164-AS AFFIDAVIT OF RALPH WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)(1).

STATE OF OREGON)
) ss
County of Lane)

I, Ralph Wilborn, being first duly sworn on oath depose and say as follows:

I am the attorney of record in the above-captioned matter. I represented Plaintiff during the federal court

proceedings in this matter. I make this Affidavit in support of Plaintiff's MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)(1). As a result of my representation in this matter, pursuant to Judgment filed October 7, 1997, the Commissioner's decision was reversed and remanded for payment of benefits.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

For approximately 14 years, I have specialized in Social Security law. I limit my law practice to representing Social Security claimants in agency and federal court proceedings. I represent *all* clients strictly on a contingent fee arrangement. I estimate that since 1990, approximately 90% of my practice has been devoted to **federal court** appeals of Social Security cases. I am the author of *Wilborn's Social Security Disability Advocate's Handbook: The Process Unification Rulings*, and the editor of *Wilborn's Selected Social Security Rulings: The Sequential Analysis of Disability*, published by James Publishing Company.

Because of my expertise in the area of Social Security disability law, in 1989, I was asked to, and did, provide, a 4-day Social Security disability training program to employees of the State of Oregon Supplemental Security Income (SSI) Liaison program. In 1991, I presented a CLE seminar on "SSI For The elderly" to Oregon attorneys in conjunction with the National Business Institutes' program, *Oregon Elder Law: The Basics and Beyond*. In March 1995, I provided a 3-day advanced Social Security disability law training program to employees of the State of Oregon SSI Liaison program. In November and December

1995, and February, 1996, I provided 2-day Social Security disability law training sessions to approximately 200 employees, including hearing officers, of the State of Oregon who implement the state's General Assistance, AFDC, and SSI Liaison programs. In May, 1997, I presented yet another 3-day Social Security disability law training program to employees of the State of Oregon SSI Liaison program.

I have been a frequent guest speaker/lecturer at Ninth Circuit Social Security conferences and at national conferences sponsored by the National Organization of Social Security Claimants' Representatives. Additionally, since 1987, upon invitation, I periodically have provided Social Security disability law seminars to support groups from such organizations as the Oregon Head Injured Foundation, Chronic Fatigue Immune Dysfunction Syndrome Society and the Multiple Sclerosis Society.

I was counsel of record in the following significant Social Security disability cases: *Pitzer v. Sullivan*, 908 F.2d 502 (9th Cir. 1990); *Morgan v. Sullivan*, 945 F.2d 1079 (9th Cir. 1991); *Rice v. Sullivan*, 947 F.2d 341 (9th Cir. 1991); *Allen v. Shalala*, 48 F.3d 456 (9th Cir. 1995); *Atkins v. Shalala*, 837 F.Supp. 318 (D.Or. 1993) *as modified by Atkins v. Chater*, 70 F.3d 529 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821 (9th Cir. 1996); *Gomez v. Chater*, 74 F.3d 967 (9th Cir. 1996); *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996); and *Forney v. Chater*, 108 F.3d 228 (9th Cir. 1997), *rev'd sub nom. Forney v. Apfel*, ___ U.S. ___ (June 15, 1998).

Because of my expertise in Social Security disability law, I frequently am asked by attorneys throughout the United States for advice in particular Social Security

cases, which I am pleased to provide. Additionally, because of my expertise in this area, other attorneys who themselves practice and/or specialize in Social Security disability law routinely refer Social Security cases to me to pursue federal court appeals. I routinely successfully appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

It is a nearly universal practice that federal court appeals of Social Security matters are undertaken upon a contingent fee basis wherein the claimant agrees to pay his/her attorneys 25% of the claimant's retroactive benefits, upon approval by the court. My customary rate for federal court representation in Social Security matters mirrors this practice in that I represent claimants under a contingent fee contract for 25% of the claimant's past-due benefits, pending approval by the court.

Thus, the so-called "market rate" for such appeals is based on Social Security appeals "as a class." The "market rate" therefore, is not an hourly lodestar. The market rate is simply 25% of a given claimant's retroactive benefits.

The attached Plaintiff's Schedule A is a printout of my contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto. Except for the 3.5 hours

expended by Tim Wilborn on 10/31/97, the time records reflect my representation.

DATED this 10th day of August, 1998.

/s/ Ralph Wilborn
RALPH WILBORN, OSB #84104
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this 10th day of August, 1998.

/s/ Etta L. Wilborn
NOTARY PUBLIC FOR OREGON

[SEAL]
OFFICAL SEAL
ETTA L. WILBORN
NOTARY PUBLIC - OREGON
COMMISSION NO. 055560
MY COMMISSION EXPIRES SEPT. 9, 2000

DATED this 10th day of August, 1998.

Respectfully submitted,

/s/ Ralph Wilborn
RALPH WILBORN
OSB # 84104
(541) 485-4265
Of Attorneys for Plaintiff

RALPH WILBORN, ATTORNEY AT LAW, OSB #84104
TIM WILBORN, ATTORNEY AT LAW, OSB #94464
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Fax: (541) 343-3601
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

BARBARA A. MILLER, Plaintiff,	)	C.V. 96-6164-AS
vs.	)	AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)
KENNETH S. APFEL, Commissioner of Social Security Defendant.	)	

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I make this Affidavit in support of Plaintiff's Motion For Approval of Attorneys Fees Pursuant To 42 U.S.C. § 406(b). Partially as a result of my efforts in this matter, pursuant to Judgment of this

court filed October 7, 1997, the final order of the Commissioner was reversed and this action was remanded to the Commissioner for the award of disability benefits. Accordingly, Plaintiff was successful in establishing her entitlement to Social Security disability insurance benefits.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda, with an emphasis on the latter. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer.

As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon, the bar of the United States District Court for the District of Oregon, and the bar of the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since becoming an attorney, apart from representing numerous claimants in agency proceedings, I have represented numerous claimants before this court and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and

in briefing before the courts. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

Very few Oregon attorneys appeal to federal court Social Security cases where the claimant was unsuccessfully represented by another attorney during agency proceedings. This is attributable largely to the fact that federal court review of agency decisions has a dismal success rate, which currently is 13%. Such attorneys may exist, but if they do, they are scarce, and claimants who have such cases face substantial difficulties in finding federal court counsel in the local or other relevant market.

It is a nearly universal practice that federal court appeals of Social Security matters are undertaken upon a contingency fee basis wherein the claimant agrees to pay his/her attorneys 25% of the claimant's retroactive benefits, upon approval by the court. My customary rate for federal court representation in Social Security matters mirrors this practice in that I represent claimants under a contingent fee contract for 25% of the claimant's past-due

benefits, pending approval by the court. (In some of my cases, my contract specifies that the federal court attorney's fee shall be the lesser of 25% of the past-due benefits or $200.00 per hour. Such a provision was not used in the contract herein.)

Thus, the "market rate" for federal court Social Security appeals is based on Social Security appeals "as a class." The "market rate" therefore is not an hourly lodestar. The market rate is simply 25% of a given claimant's retroactive benefits.

Plaintiff's Schedule A, attached to the Affidavit of Ralph Wilborn, herein, is a printout of our law firm's contemporaneous time records, in which is included an itemization of the 3.50 hours I expended in the federal court proceedings related hereto.

DATED this15th day of September, 1998.

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this 15th day of September, 1998.

/s/ Etta L. Wilborn
NOTARY PUBLIC FOR
OREGON

[SEAL] OFFICIAL SEAL
ETTA L. WILBORN
NOTARY PUBLIC - OREGON
COMMISSION NO. 055560
MY COMMISSION EXPIRES SEPT. 9, 2000

RALPH WILBORN, ATTORNEY AT LAW, OSB #84104
TIM WILBORN, ATTORNEY AT LAW, OSB #94464
Ralph Wilborn and Etta L. Wilborn, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
Voice: (541) 485-4265
Fax: (541) 343-3601
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NANCY SANDINE, Plaintiff, vs. **KENNETH S. APFEL,** Commissioner, Social Security Administration, Defendant.	)	CV 97-6197-ST AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b).

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I represented Plaintiff during the federal court proceedings in this matter. I make this Affidavit in support of PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b). As a result of my representation of

Plaintiff in this matter, pursuant to JUDGMENT of this court, filed 4/13/98, the Commissioner's decision was reversed and remanded for payment of benefits.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer. As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon and the bars of the U.S. District Court for the State of Oregon and the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since 1994, apart from representing claimants in agency proceedings, I have represented numerous claimants before the U.S. District Court for the District of Oregon and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and in briefing. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

I am aware of no Oregon attorneys, other than myself, Ralph Wilborn, and Kathryn Tassinari, who appeal to federal court Social Security cases where the claimant was unsuccessfully represented by another attorney during agency proceedings. This is attributable largely to the fact that federal court review of agency decisions has a dismal success rate. Such attorneys may exist, but if they do, they are scarce, and claimants who have such cases face substantial difficulties in finding federal court counsel in the local or other relevant market.

My current federal court contract provides for a fee of $250.00 per hour or 25% of the claimant's past-due benefits. Thus, my hourly rate currently is $250.00 per hour. Previously, this court has awarded me fees at the rate of $175.00 per hour. See *Blair v. Chater*, Civ. No. 95-6135-HA, in which I asked for and received fees in the amount of $175.00 per hour, pursuant to 42 U.S.C. § 406(b). The Commissioner did not oppose the reasonableness of the award of fees in *Blair*. See also *Widrig v. Apfel*, ___ F.3d ___, 1998 WL 156526 (9th Cir. 1998)

(upholding district court's finding that $175.00 per hour is a reasonable rate for my services).[1]

I am far more experienced in federal court litigation than I was at the time I wrote the *Blair* or *Widrig* briefs, and I believe a reasonable hourly rate for my federal court services is now at least $250.00, considering the prevailing rate in the Eugene, Medford, and Portland communities for similar services by lawyers of reasonably comparable skill, experience and reputation, considering the contingent nature of the representation, and considering my special expertise.

The attached Plaintiff's Schedule A is a printout of my law firm's contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto.

DATED this day, April 2, 1999.

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

---

[1] In *Widrig*, I had requested a lodestar of only $150.00 per hour, but the Commissioner argued, and the court found, that $175.00 per hour was a more reasonable hourly lodestar.

SUBSCRIBED AND SWORN to before me this day, April 2, 1999.

[SEAL] OFFICIAL SEAL
AMY EVENSON
NOTARY PUBLIC
OREGON
COMMISSION
NO. 057310
MY COMMISSION
EXPIRES
SEPT. 3, 2000

/s/ Amy Evenson
NOTARY PUBLIC FOR
OREGON

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170
Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Rosemary Kinney

EMPLOYMENT AGREEMENT
FEDERAL COURT SOCIAL SECURITY APPEALS

I, DON ANDERSON, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my

attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation**, all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of $245 to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS **CONTINGENT**

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement. My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

***IN WRITING WITHIN 24 HOURS* AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Donald L. Anderson
CLIENT'S SIGNATURE

544-36-7437
CLIENT'S SOCIAL SECURITY NUMBER

Dec. 9 1996
DATE

/s/ Ralph Wilborn
ATTORNEY AT LAW

/s/ Etta L. Wilborn
ATTORNEY AT LAW

/s/ Tim Wilborn
ATTORNEY AT LAW

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170 • Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Amy Evenson

EMPLOYMENT AGREEMENT

I, Gary Gisbrecht, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts, and if necessary, upon remand to the Social Security Administration. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify

further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation,** all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of $ 0 to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS **CONTINGENT**

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and/or the Social Security Administration, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement.

My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

IN WRITING WITHIN 24 HOURS **AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Gary Gisbrecht CLIENT'S SIGNATURE	/s/ Tim Wilborn- ATTORNEY AT LAW
531-60-4562 CLIENT'S SOCIAL SECURITY NUMBER	/s/ Ralph Wilborn ATTORNEY AT LAW
3/31/98 DATE	/s/ Etta L. Wilborn ATTORNEY AT LAW

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170 • Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Melanie Burkhouse

EMPLOYMENT AGREEMENT – FEDERAL COURT SOCIAL SECURITY APPEALS

I, Barbara Miller, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my

attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation,** all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of **$75.00** to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS CONTINGENT

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement. My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

***IN WRITING WITHIN 24 HOURS* AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Barbara A. Miller
CLIENT'S SIGNATURE

CLIENT'S SOCIAL SECURITY NUMBER

June 16, 1996
DATE

/s/ Ralph Wilborn
ATTORNEY AT LAW

/s/ Etta L. Wilborn
ATTORNEY AT LAW

/s/ Tim Wilborn
ATTORNEY AT LAW

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170 • Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Rosemary Kinney

EMPLOYMENT AGREEMENT – FEDERAL COURT SOCIAL SECURITY APPEALS

I, Nancy Sandine, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my

attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation,** all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of $240.00 to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS CONTINGENT

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement. My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

***IN WRITING WITHIN 24 HOURS* AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Nancy V. Sandine
CLIENT'S SIGNATURE

/s/ Ralph Wilborn
ATTORNEY AT LAW

544-40-6370
CLIENT'S SOCIAL SECURITY NUMBER

/s/ Tim Wilborn
ATTORNEY AT LAW

7/29/97
DATE

/s/ Etta Wilborn
ATTORNEY AT LAW

PETER S. YOUNG
Attorney at Law
California State Bar No. 60219

271 Miller Avenue
Mill Valley, CA 94941-2862
(415) 388-2400

AFFIDAVIT OF PETER S. YOUNG

STATE OF CALIFORNIA,)
) ss
County of Marin)

I Peter S. Young, Attorney at Law, being duly sworn on oath depose and say as follows:

I am an attorney with 16 years of experience in the field of Social Security Disability representation, practicing before the three agency hearing offices serving residents of the San Francisco Bay Area. I also consult with the local Social Security bar regularly, in my capacity as the editor of "Social Security Advisory Service," an information service for advanced Social Security practitioners. I am the designated consultant in my geographic area for attorney fee issues raised by members of the National Organization of Social Security Claimants' Representatives. I have testified as an expert witness on Social Security attorney fee issues in proceedings of the California State Bar Court.

Based on the foregoing, I am very familiar with the general practices of attorneys in this region as to attorney fees typically charged for representing Social Security Disability claimants.

I make this affidavit for the purpose of stating the following regarding my knowledge of the market rate for attorney fees among Social Security Disability attorneys:

To the best of my knowledge, Social Security Disability attorneys nearly always use fee contracts which provide for a contingent attorney fee equalling 25% (twenty five percent) of the claimant's retroactive benefits. Few, if any, attorneys use contracts which provide for an hourly rate. For representation during proceedings before the Social Security Administration, most attorney fee contracts specify that the maximum fee is a set dollar amount that is typically $4,000.00. Even with this upper fee limit, the typical recovery based on time expended for a successful case averages substantially above $250.00 per hour.

Contingent fee contracts for representation before the federal courts (including the contract used in my own office) normally do not contain a maximum dollar amount fee limit, and the market rate for federal court representation is simply 25% (twenty five percent) of the claimant's retroactive benefit recovery.

DATED this 13th day of May, 1998.

/s/ Peter S. Young
Peter S. Young Attorney at Law

SUBSCRIBED AND SWORN TO before me this 13th day of MAY, 1998.

[SEAL] ROBERT J. BEGLEY
COMM. # 1073153
NOTARY PUBLIC-CALIFORNIA
Marin County
My Comm. Expires Sept. 28, 1999

/s/ Robert Begley
NOTARY PUBLIC

AFFIDAVIT OF BRUCE BREWER

STATE OF WASHINGTON)
) ss
County of Thurston)

I, Bruce Brewer, Attorney at Law, being duly sworn on oath depose and say as follows:

I am an attorney with several years of experience in the field of Social Security Disability claimants' representation, having practiced in law office in the Eugene, Oregon, Portland, Oregon, and Olympia, Washington areas. I am familiar with the general practices of attorneys in these cities, as regards attorney fees typically charged for representing Social Security Disability claimants.

I make this affidavit for the purpose of stating the following regarding my knowledge of the market rate for attorney fees among Social Security Disability attorneys:

To the best of my knowledge, Social Security Disability attorneys virtually always use contracts which provide that the attorneys' fees will be 25% (twenty-five percent) of the claimant's retroactive benefits. Few, if any, attorneys use contracts which provide for an hourly rate. For representation during proceedings before the Social Security Administration, many attorneys' contracts specify that the maximum fee is a set dollar amount (typically $4,000.00), but often, even with this limit, the fee charged for administrative representation would be substantially higher than $250.00 per hour if viewed in terms of an hourly rate. Contracts for representation before the federal courts (including the contract used by all the attorneys in my own office) often do not contain such a

maximum dollar amount fee limit, and the market rate for federal court representation is simply 25% (twenty-five percent) of the retroactive benefits.

DATED this 12 day of May, 1998.

/s/ Bruce Brewer
Bruce Brewer, Attorney at Law

SUBSCRIBED AND SWORN TO before me this 12 day of May, 1998.

/s/ Elie Halpern
NOTARY PUBLIC

[SEAL] OFFICIAL SEAL
ELIE HALPERN
Notary Public – State of Washington
My Commission Expires 12-9-99

Declaration of Attorney Eric Schnaufer
Pursuant to 28 U.S.C. § 1746

1. For several years I have represented claimants for Social Security Disability Insurance Benefits.

2. For several years I have been an independent contractor for and consultant to attorneys who represent claimants for Social Security Disability Insurance Benefits.

3. I am familiar with attorney fee agreements attorneys make with claimants for Social Security Disability Insurance Benefits; the statements in this declaration are based on the best of my knowledge; and the statements in this declaration concern attorney fee agreements relevant to section 206(b) of the Social Security act, 42 U.S.C. § 406(b), and do not address the relationship between 42

U.S.C. § 406(b) and Equal Access to Justice Act, 28 U.S.C. § 2412(d).

4. Attorney fee agreements with claimants for Social Security Disability Insurance Benefits are similar in all judicial circuits and geographic regions.

5. Attorney fee agreements for legal services for claimants for Social Security Disability Insurance Benefits almost always specify that the attorney fees will be twenty-five percent of past due benefits payable.

6. It is extraordinarily rare for an attorney fee agreement for legal services for a claimant for Social Security Disability Insurance Benefits to specify an hourly rate.

7. Attorney fee agreements for legal services for plaintiffs for Social Security Disability Insurance Benefits almost always specify that the attorney fees will be twenty-five percent of past due benefits payable.

8. There is no true "market" rate for attorney fees for plaintiffs for Social Security Disability Benefits because there is a statutory maximum on the amount of attorney fees a court may award and because almost all attorney fee agreements for legal services for plaintiffs for Social Security Disability Insurance Benefits specify that attorney fees will be the statutory maximum fees, i.e., twenty-five percent of past due benefits payable.

9. The market rate for attorney fees for plaintiffs for Social Security Disability Benefits is thus the statutory maximum fee.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 18, 1998.

/s/ Eric Schnaufer
Eric Schnaufer
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OREGON STATE BAR
1998 ECONOMIC SURVEY

October 1998

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Plaintiff's Exhibit E - Page 2

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)

Hours Billed by Method of Pay: Hours billed per month are presented in the following table by method of pay for attorneys in private practice working full-time or part-time by choice. The overall median number of hours for employees was 139 while the Portland region was highest with 145 hours per month. Owner overall median number of hours was 110 and 130 for the Portland region. This data was not collected in the 1994 survey.

Hours Billed Per Month by Method of Pay- Private Practice									
Method of Pay		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Owner (e.g., Partner, Shareholder, Sole Practitioner)	Average	103	120	80	100	97	100	97	80
	Median	110	130	80	100	110	100	100	80
Employee (e.g., salaried or hourly paid)	Average	124	135	112	117	111	90	113	81
	Median	139	145	120	115	120	100	120	64
Contract (e.g., paid by hour or assignment)	Average	80	82	89	65	n/a	n/a	n/a	n/a
	Median	88	83	100	74	n/a	n/a	n/a	n/a

Billing Rate: The low, average, median, and high hourly billing rates are included in the following table. This data and subsequent tables regarding billing rates includes attorneys in private practice working full-time, part-time by choice, or part-time due to lack of legal work. The overall average and median billing rates of $138 and $130 per hour compare to $123 and $120 in the 1994 survey.

Hourly Billing Rate Overall - Private Practice								
Hourly Billing Rate	Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Low	15	25	15	30	25	80	50	90
Average	138	155	128	121	130	125	120	121
Median	130	150	125	125	125	125	125	125
High	365	300	365	195	240	250	160	175

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Total Years Admitted to Practice: Average and median hourly billing rates by total years admitted to practice are presented in the following table. Overall average and median billing rates were generally higher with the more years admitted to practice. Regional data exhibits some variations, but generally follows the trend of higher rates as years of experience increase.

Hourly Billing Rate by Total Years Admitted to Practice - Private Practice									
Years Admitted		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
0-3 Years	Average	100	104	89	104	103	96	105	108
	Median	100	105	100	100	100	95	100	100
4-6 Years	Average	114	120	123	104	94	103	109	107
	Median	115	125	120	100	100	100	108	100
7-9 Years	Average	122	141	116	109	113	108	115	111
	Median	125	140	125	120	125	105	120	120
10-12 Years	Average	135	145	131	110	119	127	130	n/a
	Median	128	150	125	105	125	125	140	n/a
13-15 Years	Average	141	155	132	134	128	111	126	115
	Median	140	150	135	138	139	110	130	118
16-20 Years	Average	148	170	127	129	143	122	125	121
	Median	145	175	125	140	150	125	135	125
21-30 Years	Average	157	178	148	140	145	139	130	133
	Median	150	180	150	143	150	135	125	125
Over 30 Years	Average	163	181	164	134	150	142	118	129
	Median	150	175	140	125	150	140	125	125

Hourly Billing Rate by Area of Private Practice									
Area of Private Practice		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Family Law	Average	126	144	125	126	122	110	113	124
	Median	125	150	125	125	125	100	110	125
Real Estate/Land Use	Average	147	167	132	111	153	127	129	108
	Median	143	170	128	105	150	120	129	100
Tax/Estate Planning	Average	150	168	139	129	150	137	135	116
	Median	150	165	140	125	150	143	143	120
Workers' Compensation	Average	133	133	136	115	154	123	n/a	n/a
	Median	125	123	125	113	150	120	n/a	n/a
General (no area over 50%)	Average	127	146	119	118	125	128	118	122
	Median	125	143	120	120	125	130	125	125
Other	Average	155	169	142	125	145	107	n/a	n/a
	Median	150	175	135	120	150	110	n/a	n/a

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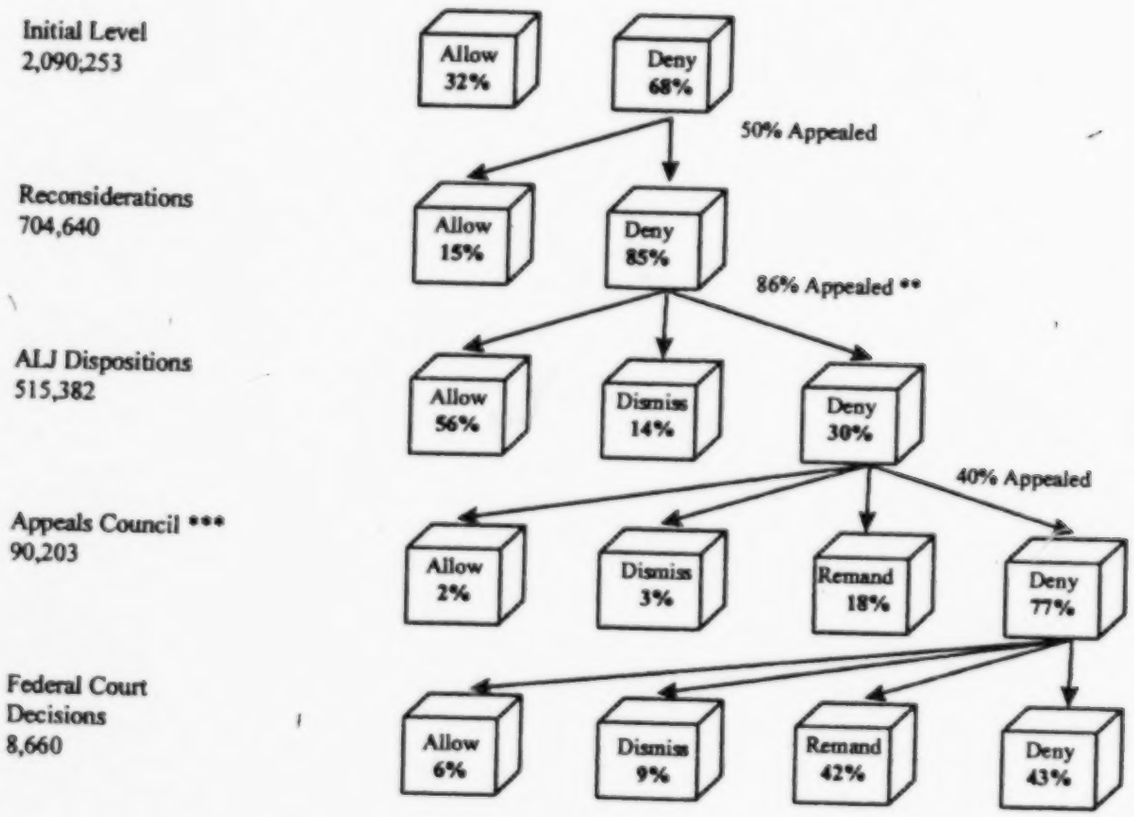
Billing Methods: Data for percentage of time and income was collected for various types of billing methods. Hourly billing remains the principal method of billing with the percentage of time increasing from 68% in 1994 to 70% and the percentage of income increasing from 66% to 69%. Contingency billing decreased slightly from the 1994 survey and flat rate billing remained relatively stable. The average percentage of time spent for a particular billing method continues to closely relate to the average percentage of income derived from that billing method.

Average Percentage of Time and Income by Billing Method - Private Practice

Billing Method		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Hourly Billing	% Time	70%	75%	66%	68%	67%	65%	71%	62%
	% Income	69%	74%	65%	64%	68%	59%	70%	64%
Contingency	% Time	15%	15%	14%	16%	18%	17%	10%	14%
	% Income	16%	17%	13%	20%	17%	19%	10%	13%
Flat Rate	% Time	11%	7%	17%	12%	12%	16%	16%	14%
	% Income	12%	7%	18%	13%	11%	20%	16%	17%
Value Billing	% Time	2%	2%	2%	2%	2%	1%	2%	2%
	% Income	2%	2%	2%	2%	1%	2%	2%	3%
Other	% Time	1%	1%	1%	1%	2%	0%	1%	8%
	% Income	1%	1%	2%	1%	3%	0%	2%	3%

DI AND SSI DISABILITY DETERMINATIONS AND APPEALS
Fiscal Year 1997*



% of Total Allowances	
Total	100.0
Initial Applications	62.8
Reconsiderations	9.9
ALJs	27.1
Appeals Council	.1
Federal Court	.05

* The data relate to workloads processed (but not necessarily received) in fiscal year 1997, i.e. the cases processed at each adjudicative level may include cases received at 1 or more of the lower adjudicative levels prior to FY 1997. The data include determinations on initial applications only.

** Many ALJ dispositions, Appeals Council and Federal court decisions are based on DDS determinations from a previous year. Appeal rates from reconsideration to ALJ for applications are historically about 65 percent. Due to declining reconsideration workloads and agency initiatives to reduce ALJ backlogs in FY 1997, computation of reconsideration denials and ALJ dispositions yields an inflated 86 percent appeal rate for initial claims. Dismissals as well as denials are appealed.

*** Includes ALJ decisions not appealed further by the claimant but reviewed by the Appeals Council on "own motion" authority.

Source: Social Security Administration, 1998.

No. 01-131

In the Supreme Court of the United States

GARY E. GISBRECHT, ET AL., PETITIONER

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 406(b) of Title 42, United States Code, provides that, when a claimant for benefits under Title II of the Social Security Act obtains a favorable court judgment awarding benefits, the court may award directly to the claimant's attorney a reasonable attorney's fee as a deduction from the claimant's back-benefits award, in an amount no greater than 25 percent of the back benefits awarded. The question presented is whether the court, when calculating that reasonable attorney's fee, should use an hourly-based "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain other adjustments), or should employ a rebuttable presumption that the attorney should receive 25 percent of the back benefits awarded, the maximum award permitted by the statute.

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In the Supreme Court of the United States

No. 01-131

GARY E. GISBRECHT, ET AL., PETITIONER

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 238 F.3d 1196. The decisions of the district courts (Pet. App. 17-22, 23-32, 33-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2000. A petition for rehearing was denied on April 20, 2001. Pet. App. 43. The petition for a writ of certiorari was filed on July 19, 2001, and was granted on November 26, 2001. The jurisdiction of this Court rests under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Social Security Act are reprinted in the appendix to the brief for petitioners. Pet. Br. App. 1-8.

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, establishes special rules applicable to efforts by attorneys to collect fees from their clients for representation in court in any case in which a claimant seeks old-age, survivor, or disability benefits under Title II of the Act.[1] Section 406(b) of Title 42 sets forth the exclusive method by which an attorney may obligate a claimant for Title II benefits to pay an attorney's fee in the event "a court renders a judgment favorable to a claimant." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999).[2] The statute directs the court to determine "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of" the favorable judgment. *Ibid.* Once the court has set the fee, the Commissioner of Social Security may deduct the fee amount from the claimant's payment of past-due benefits, and pay the fee directly to the attorney. *Ibid.*

In addition, a prevailing claimant for Title II benefits may seek an attorney's fee award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in any case in which the Commissioner's position in the litigation was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). Any EAJA fee is paid by the govern-

[1] No provision of the Act governs attorney's fee requests for litigation seeking Supplemental Security Income (SSI) benefits under Title XVI of the Act (42 U.S.C. 1382 *et seq.* (1994 & Supp. V 1999)). See *Bowen* v. *Galbreath*, 485 U.S. 74 (1988).

[2] "[N]o other fee may be payable or certified for payment for such representation except as provided in this paragraph." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999). "Any attorney who charges, demands, receives, or collects" a fee "in excess of that allowed by the court" under Section 406(b)(1) may be charged with a misdemeanor. 42 U.S.C. 406(b)(2).

ment out of the treasury, rather than being deducted from the claimant's past-benefits award. Congress expressly provided that an award under Section 406(b) of the Social Security Act "shall not prevent an award of fees and other expenses under section 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186. Congress also required that "the claimant's attorney refund[] to the claimant the amount of the smaller fee." *Ibid.* Thus, an EAJA award offsets an award under Section 406(b), so that the actual amount that the claimant receives out of the past-due benefits will be increased by the amount of the EAJA award up to the point the claimant receives 100 percent of the past-due benefits. EAJA imposes limits on the size of an award, including the express limit of fees to $125 per hour, which may be increased to reflect a cost of living adjustment. See 28 U.S.C. 2412(d)(2)(A) (Supp. V 1999).

2. Petitioners brought three separate actions in the district court for the district of Oregon under 42 U.S.C. 405(g), seeking social security disability benefits under Title II.[3] All three petitioners prevailed on the merits

[3] Although the claimants are named as the petitioners in this case, the real parties in interest are their attorneys, who are actually seeking to *decrease* the claimants' net awards of past-due benefits. See *Hopkins* v. *Cohen*, 390 U.S. 530, 531 n.2 (1968). Nevertheless, for ease of reference, we will follow this Court's practice in *Hopkins* (see *ibid.*) and refer to the claimants, rather than their attorneys, as petitioners.

Similarly, the Commissioner is the respondent because of her role as defendant in the underlying claims for benefits. The Commissioner, however, does not have a direct financial stake in the outcome of Section 406(b) fee litigation because the fee award generally will be deducted from the claimant's back benefits and will not result in an additional charge against the Treasury. The Commissioner thus serves a role in the litigation analogous to that of a trustee for the benefits claimant. Courts uniformly have per-

of their claims, with the district courts in each case reversing the decision of the Commissioner to deny benefits. Pet. App. 5. All three petitioners then sought attorney's fee awards against the Commissioner under EAJA, which all three district courts awarded.[4]

Counsel then moved for additional fee awards under Section 406(b). Attorneys Tim Wilborn and Ralph Wilborn represented petitioners in all three cases, and they asked in each of the cases for an award of the maximum amount of 25 percent of petitioners' back benefits. Pet. App. 19, 30, 33. The contracts signed by all three petitioners state that they agree to pay counsel 25 percent of past due benefits recovered, with no mention of any

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mitted the Commissioner or her regulatory predecessors to participate as a party in Section 406(b) attorney's fee litigation to represent the interests of the claimants and to ensure the proper administration of the statutory scheme. See, *e.g.*, *Burnett* v. *Heckler*, 756 F.2d 621, 624 (8th Cir. 1985) ("[T]he Secretary is entitled to participate in attorney's fee matters to protect the claimant's interest."). Accord *McKittrick* v. *Gardner*, 378 F.2d 872, 875 n.4 (4th Cir. 1967); *Lewis* v. *Secretary of HHS*, 707 F.2d 246, 248 (6th Cir. 1983); *Starr* v. *Bowen*, 831 F.2d 872, 874 (9th Cir. 1987). But cf. *Coup* v. *Heckler*, 834 F.2d 313, 325 (3d Cir. 1987) (recognizing Secretary's standing but suggesting role be limited to "explain[ing] what * * * an appropriate fee for the work in the district court would be, if calculated in accordance with the [Secretary's] standards"). In a prior dispute over attorney's fees under Section 406(b), this Court raised no question concerning the participation of the Secretary of Health and Human Services as respondent. *Hopkins*, 390 U.S. at 530. Indeed, because a social security disability claimant is unlikely to hire new counsel to litigate fee issues, the Commissioner generally will be the only party in a position to oppose an unreasonable fee request.

[4] Gisbrecht was awarded $3339.11 (Pet. App. 17); Miller was awarded $5164.75 in fees and $80.42 in expenses (*id.* at 27); and Sandine was awarded $6836.10 in fees and $253.16 in expenses (*id.* at 33).

other method for calculating fee payments, such as an hourly rate. *Id.* at 74, 79, 84.[5] In addition, counsel submitted affidavits, from themselves and other lawyers, asserting that it is the "universal practice," in Oregon and across the country, for counsel to undertake social security litigation on a contingency basis, with the claimant agreeing to pay counsel 25 percent of their retroactive benefits. *Id.* at 56, 60, 88, 89, 91.

In addition, counsel submitted excerpts from an Oregon State Bar Economic Survey (the Flikirs report), giving ranges of hourly rates for different types of lawyers, by geographic location in the state, years of practice, and subject-matter areas of practice. Pet. App. 93-97. Among the findings of this survey are that the statewide median rate for all lawyers is $130 an hour, with a range in Portland from a low rate of $25 an hour to a high rate of $300. *Id.* at 94. Lawyers with 4-6 years experience (like Tim Wilborn, who was principal counsel in these cases (see *id.* at 45)) have a median rate statewide of $115 an hour ($125 an hour in Portland). *Id.* at 95.

3. In all three cases, the district courts denied counsel's request for the statutory maximum of 25 percent of the back benefits awarded. Citing prior Ninth Circuit precedents in social security cases, the courts all calculated the fees by using the lodestar method (multiplying a reasonable number of hours spent by a reasonable hourly rate for the lawyer's local market). Pet. App. 18-19, 24-25, 29-30, 35. Each district court thus rejected counsel's argument that 25 percent of the

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[5] In affidavits addressing two of the cases underlying the petition, Tim Wilborn stated that his contract called in the alternative for $250 per hour. Pet. App. 50, 64. This appears to contradict the terms of the contracts themselves. *Id.* at 74, 84.

back benefits is the market rate on the grounds that it was contrary to Ninth Circuit precedent and was not supported by the record. *Id.* at 19-21, 24-25, 30-31, 36-38. Instead, all three courts adopted a rate of $125 per hour for Tim Wilborn (*id.* at 21) and refused to enhance the lodestar to take into account the contingent nature of the fees. *Id.* at 14, 21-22, 26, 39-40.[6]

4. Petitioners appealed all three cases, which the court of appeals consolidated for argument and decision. Pet. App. 5.[7] The court of appeals affirmed all of the fee awards. *Ibid.* At the outset of its decision, the court of appeals explained that it has long followed the lodestar method of calculating fees under Section 406(b), citing *Allen* v. *Shalala*, 48 F.3d 456, 458 (9th Cir. 1995), and *Starr* v. *Bowen*, 831 F.2d 872, 874 (9th Cir. 1987). Pet. App. 6. It noted that the Fourth, Fifth, and Eighth Circuits also follow the lodestar method,[8] but that the

[6] The *Miller* court set a separate rate for Ralph Wilborn at $150 per hour. Pet. App. 31.

[7] The consolidated court of appeals decision also considered the award in a fourth case, *Anderson* v. *Apfel*. See Pet. App. 4. In that case, the Wilborns asked for $10,013.50, calculated at $175 per hour, a sum that would have been 7.8 percent of the back-benefits award. *Id.* at 12. The district court in *Anderson* instead set the rate at $150 per hour. *Id.* at 15. Anderson joined the other three claimants as petitioner in this Court, but on November 26, 2001, this Court granted the petition only as to the three other claimants and denied it as to Anderson.

[8] Citing *Brown* v. *Sullivan*, 917 F.2d 189 (5th Cir. 1990); *Cotter* v. *Bowen*, 879 F.2d 359 (8th Cir. 1989); and *Craig* v. *Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324 (4th Cir. 1989). In addition to the three circuits cited by the court of appeals, the Third, Tenth, and Eleventh Circuits also follow the lodestar rule. See *Coup* v. *Heckler*, 834 F.2d 313 (3d Cir. 1987); *Hubbard* v. *Shalala*, 12 F.3d 946 (10th Cir. 1993); *Kay* v. *Apfel*, 176 F.3d 1322 (11th Cir. 1999). One other court of appeals, the First, has not explicitly required the lodestar method, but has rejected the contingency method. See *Ramos Colon* v. *Secretary of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988) (per curiam).

Second, Sixth and Seventh instead follow the "contingency" method, under which the court treats as presumptively reasonable the agreement between the claimant and the attorney to pay the attorney a percentage of the recovery.[9] The court explained that it has previously "noted the split of circuits and has rejected the contingency method expressly." *Id.* at 6 n.2 (citing *Allen*, 48 F.3d at 459).

The court of appeals rejected petitioners' argument that the "market rate" that should be used to calculate fees under the lodestar method is 25 percent of the past-due benefits. The court reasoned that to do so would "in essence" mean that it would be adopting the contingency method, even though it rejected that method in *Allen*. Pet. App. 7. To the extent that petitioners "are attempting to blur the distinction between the lodestar and contingency methods," the court held, "their argument is unavailing." *Ibid.* The court also found that the district courts did not abuse their discretion in setting hourly rates at $125 and $150 per hour, explaining that the Oregon State Bar survey shows those rates to be the average hourly rates for lawyers of comparable experience. *Id.* at 8.

In addition, the court rejected petitioners' argument that it should increase the lodestar to reflect the contingent nature of Section 406(b) cases as a class, noting that it had previously rejected such an enhancement in *Widrig* v. *Apfel*, 140 F.3d 1207, 1210-1211 (9th Cir.

[9] Citing *Wells* v. *Sullivan*, 907 F.2d 367 (2d Cir. 1990); *McGuire* v. *Sullivan*, 873 F.2d 974 (7th Cir. 1989); and *Rodriguez* v. *Bowen*, 865 F.2d 739 (6th Cir. 1989) (en banc).

1998). Pet. App. 8-9. The court observed that petitioners "do not argue that any of these four cases was particularly risky on an individual basis." *Id.* at 9 n.3. The court held that to enhance the lodestar rates to take into account the fact that lawyers sometimes lose their cases and thus do not get paid under Section 406(b) is improper because it would mean "'essentially asking victorious claimants to "subsidize" the claims of losing claimants' by 'tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants.'" *Id.* at 9 (quoting *Straw* v. *Bowen*, 866 F.2d 1167, 1171 (9th Cir. 1989)).

SUMMARY OF ARGUMENT

Section 406(b) of the Social Security Act, enacted in 1965, grants courts the responsibility to "determine and allow * * * a reasonable fee" for attorneys who successfully represent claimants for Title II benefits. 42 U.S.C. 406(b) (1994 & Supp. V 1999). In the decades since Congress adopted this fee provision, courts have had extensive experience determining "reasonable" attorney's fees under many statutes, including 42 U.S.C. 1988(b) (1994 & Supp. V 1999), which, in language common to other fee-shifting statutes and to Section 406(b), authorizes courts to "allow * * * a reasonable attorney's fee" to prevailing parties.

Courts routinely calculate "reasonable" attorney's fees under such statutes by the lodestar method, under which the attorney submits documentation of the hours spent on the case and of the prevailing hourly rate in the local market for similar services. The court reviews those submissions and determines an appropriate number of hours and an appropriate hourly rate, which when multiplied together yield the total award.

The lodestar method has become a well-established feature of this Court's attorney's fees jurisprudence, and accordingly, there is "a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992) (citation omitted). As this Court held in *Hensley* v. *Eckerhart*, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. 424, 433 (1983). Just as with the fee-shifting statutes at issue in *Hensley* and its progeny, the lodestar method is the most appropriate one for courts to use to "determine and allow * * * a reasonable fee" in social security cases under Section 406(b). The text and legislative history of Section 406(b), which demonstrate Congress's intent that courts should "determine" a "reasonable" fee within the statutory cap of 25 percent of the back benefits awarded as a way to protect Title II Social Security claimants from abusive fee arrangements, confirms the appropriateness of the lodestar method.

Petitioners' alternative method—under which an award of 25 percent of the back benefits is presumptively reasonable—is inconsistent with the text and legislative history of Section 406(b). Indeed, petitioners' approach would turn Section 406(b) on its head, transforming the statute's maximum fee award into the presumptive minimum fee award as well. Rather than relying on such key fee-related factors as the quality and amount of the legal services provided, under petitioners' approach the size of the fee would depend primarily on factors relevant to the amount of back benefits owed but largely unrelated to a reasonable

rate, such as the amount of delay in obtaining the back-benefits award, the amount of the claimant's earnings and years of covered employment over the course of his career, and the number of the claimant's dependents. As a result, petitioners' approach would frequently overcompensate counsel at the expense of the very claimants Congress sought to protect by enacting Section 406(b).

The lodestar method, in contrast, does not produce such anomalous and unfair results. Rather, it is precisely tailored to provide the compensation for attorneys in each case that is appropriate for the legal services provided. That is what Congress intended by a "reasonable" fee.

Finally, for the same reasons this Court articulated in *Dague*, the lodestar in Section 406(b) cases should not be enhanced because an award of fees is contingent on an award of back benefits. Petitioners' proposed contingency enhancement would generally serve to make Section 406(b)'s 25 percent cap on fees the presumptive fee in most cases, and would frustrate the statute's primary goal of ensuring that the claimant keep as much of the back-benefits award as possible.

ARGUMENT

COURTS SHOULD USE THE LODESTAR METHOD TO DETERMINE A REASONABLE ATTORNEY'S FEE UNDER THE SOCIAL SECURITY ACT

A. The Lodestar Method Best Reflects The Plain Language Of Section 406(b)

1. Congress provided in Section 406(b)(1)(A) that when an attorney has represented a claimant for benfits and obtains a favorable judgment, "the court may determine and allow as part of its judgment *a reasonable fee* for such representation, *not in excess of*

25 percent of the total of the past-due benefits to which the claimant is entitled by reason of" the favorable judgment. 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999) (emphases added). The statute thus affirmatively grants the court, not the claimant and his attorney, the power to set a "reasonable" fee "not in excess of 25 percent" of the back benefits awarded. Accordingly, the amount of the fee award is expressly determined by the court as an exercise of its discretion within the parameters established by the statute. See, *e.g.*, *Kay* v. *Apfel*, 176 F.3d 1322, 1325 (11th Cir. 1999) ("courts have an affirmative duty to ensure that a Social Security claimant's attorney receives only a 'reasonable' fee, regardless of the contractual arrangements the claimant and his attorney may have reached"); *McKittrick* v. *Gardner*, 378 F.2d 872, 873 (4th Cir. 1967) ("our reading of the statute * * * requir[es] the court in every case to fix and determine a reasonable fee for services rendered in the court").[10]

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[10] Amicus the National Organization of Social Security Claimants' Representatives (NOSSCR) contends (NOSSCR Br. 7) that "[t]he lodestar method's initial focus on hours and rates * * * is inconsistent with the order in which Congress placed the phrases in §406(b)(1)" because it ignores Section 406(b)(1)'s initial requirement that there be a favorable judgment for the claimant. The requirement of determining that there is a favorable judgment before determining a reasonable fee, however, is not inconsistent with the lodestar method, as evidenced by the "prevailing party" requirement of most fee-shifting statutes. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Moreover, the requirement follows directly from the statute's prohibition of any fee award in cases that do not lead to a payment of back benefits. See note 2 *supra*. In reality, it is NOSSCR that seeks to reorder the statute, but contrary to its assertion (NOSSCR Br. 7-8), Section 406(b) does not require a court to apply the 25 percent limitation "before

Petitioners nevertheless contend that Section 406(b) restricts the court's role merely to determining the "upper limit of the range of reasonable fees" (Pet. Br. 40) and then reviewing the contract between the claimant and his counsel to determine whether the fee provided for by the contract is "within the range" of reasonable, non-abusive fees (*id.* at 16). According to petitioners, "nothing in [the] language or the legislative history of section 406(b) contemplates that the court should go further and select from within the range of non-abusive fees the amount which the judge thinks most appropriate." *Ibid.*

Petitioners' assertions are rebutted by the plain language of the statute. On its face, Section 406(b) gives a court the power to select a particular fee that it concludes is "reasonable," not just non-abusive. The statute provides for the *court*, not the claimant, his attorney, or their fee contract, to "determine" the "fee." Nothing in its language suggests that the court's role is limited to reviewing the existing fee contract and intervening only in the rare instance when that contract is abusive, as petitioners claim. The focus of the statute is on "a reasonable fee," not a "reasonable fee contract." Although the fee agreement itself may be a relevant factor courts can consider in determining the lodestar, see *Blanchard* v. *Bergeron*, 489 U.S. 87, 93 (1989), nothing in either the statute or this Court's decisions regarding attorney's fees suggests that the contractual fee should control the court's determination of a reasonable fee. *Id.* at 94 (lodestar remains "centerpiece of attorney's fee awards" even where "prevailing party

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reaching the 'reasonable fee' test." Rather, on its face, the statute first calls on the court to determine a reasonable fee, and then states that it may "not [be] in excess of 25 percent * * *."

and his (or her) attorney have executed a contingent-fee agreement").

Petitioners mistakenly contend (Pet. Br. 29) that it would be "anachronistic" to adopt the lodestar analysis for Section 406(b) claims because, when Congress enacted Section 406(b) in 1965, relatively few attorneys in private practice used hourly billing methods and the courts had not yet developed the formal lodestar analysis. This Court, however, has not hesitated to apply the lodestar method to other statutes requiring a "reasonable" fee, most notably the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), even though they were enacted before the development of the formal lodestar analysis. See *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989) (similar language between Section 2000e-5(k) and other attorney's fee provisions "is 'a strong indication' that they are to be interpreted alike"). Moreover, long before this Court formally adopted the lodestar method in *Hensley*, courts had rejected the central premise of petitioners' argument—that Section 406(b) requires courts to defer to a preexisting 25 percent contingency contract, rather than setting a fee the court deems the most reasonable. *E.g.*, *McKittrick*, 378 F.2d at 873-874 ("'Routine approval of the statutory maximum allowable fee should be avoided in all cases,' and this is true whether or not the fee claim has a contractual basis. * * * [Section 406(b)] requires the court to fix and allow a reasonable fee for services rendered" and "appears to contemplate no blind deference to contractual fee arrangements.") (citation omitted); *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) (same); *Webb* v. *Richardson*, 472 F.2d 529, 538 (6th Cir. 1972) (same), rev'd on other grounds, 35 F.3d 261 (6th Cir. 1994).

Petitioners attempt to find support for their reading of the statute in its use of the phrase "*a* reasonable fee" rather than "*the* reasonable fee." They argue that the indefinite article "a" suggests a range of reasonable fees, and that the existence of this range somehow alters the meaning of term "determine." Pet. Br. 20-21. According to petitioners, a requirement to "determine *the* reasonable fee" would "suggest[] that there is one particular fee that is reasonable, and * * * the court is to detect what it is," whereas "the phrase 'determine *a* reasonable fee' means only that the court will definitively resolve what the fee is, and that the fee chosen must be reasonable." *Ibid.* But Congress's use of an indefinite rather than a definite article in this case is too thin a reed on which to build a theory of statutory construction, especially in light of the "strong presumption" favoring the lodestar method. See *Dague*, 505 U.S. at 562.

To the extent the indefinite article suggests anything, it underscores the district court's discretion (and suggests an abuse of discretion standard of review). Thus, the existence of a range of reasonable fees is in no way inconsistent with the lodestar analysis, as even petitioners are forced to concede. See Pet. Br. 21 (phrase "determine *a* reasonable fee" "does not purport to indicate how the court is to make the choice among the range of fees that would be reasonable"). Indeed, far from being inconsistent with the lodestar method, such discretion is one of the lodestar method's principal attractions. See *Blanchard*, 489 U.S. at 87 ("a private fee arrangement is but one of the many factors to be considered and cannot, standing alone, impose an automatic limitation on the exercise of the trial judge's discretion, which is central to the operation of [Section 1988's "reasonable fee" requirement]").

Petitioners' asserted presumption in favor of a fee award equal to 25 percent of back benefits would render Section 406(b)'s requirement of a "reasonable" fee largely meaningless. The term "reasonable" generally signals a preference for a contextual analysis taking a variety of factors into account. See, *e.g.*, *United States* v. *Arvizu*, 122 S.Ct. 744, 751 (2002) ("reasonable" suspicion requires courts to look at "totality of the circumstances," and should not be reduced to "'a neat set of legal rules'") (quoting *Ornelas* v. *United States*, 517 U.S. 690 (1996)). Yet petitioners' urge what amounts to a single variable analysis. Petitioners would convert the 25 percent ceiling into the presumptive floor as well, and courts always would award a fee of 25 percent, except in the unusual case where such a high fee would be clearly "abusive."[11] But Section 406(b) does not say that counsel will get 25 percent unless that amount is abusive or outside the "outer limit of reasonableness" (Pet. Br. 27 (citation omitted)). Rather, it says that counsel will get "a reasonable fee * * * not in excess of 25 percent * * *," as determined by the court. Thus, as the text of Section 406(b) indicates, the touchstone of the statute is a reasonable fee, with 25 percent

[11] Thus, for example, the Sixth Circuit, which generally follows petitioners' contingency method, would reduce a fee award below 25 percent of the back benefits where counsel's improper conduct delayed the final judgment, thereby causing the amount of back benefits to increase (which in turn would increase the fee award under a straight 25 percent calculation), or where counsel "would otherwise enjoy a windfall because of either an inordinately large benefit award or from minimal effort expended." *Rodriquez*, 865 F.2d at 746. Unlike petitioners' presumption, however, the Sixth Circuit has indicated that, regardless of the fee contract, courts "should only allow maximum fees for extensive effort on the part of counsel who have overcome legal and factual obstacles to the enhancement of the benefits awarded to his client." *Id.* at 747.

the upper limit, not, as petitioners would have it, a 25 percent fee, with unreasonableness as an infrequent exception.[12]

Moreover, if, as petitioners contend, Congress had intended for courts merely to set the "upper limit of the range of reasonable fees" (Pet. Br. 40) and to defer to any agreement between the attorney and claimant within that limit, it would have written a very different statute. Notably, at the time Congress enacted Section 406(b) in 1965, a preexisting provision regulating attorney's fees for work done before the agency provided that the agency "may, by rule and regulation, prescribe *the maximum fees which may be charged* for services performed in connection with any claim before the [agency]." Act of Aug. 10, 1939, Pub. L. No. 76-379, § 201, 53 Stat. 1362, 1372 (emphasis added). The 1965 amendments simultaneously retained this authorization for the agency to set "maximum" fees in administrative proceedings (as Section 406(a) of the Social Security Act) and enacted Section 406(b) to regulate court-related attorney's fees. Rather than limiting courts to determining the "maximum" fees allowable for a particular representation, however, Congress chose to

[12] Yet another problem with petitioners' excessive focus on the percentage fee set in the contracts, which is uniformly set at 25 percent of the back benefits awarded, is that Congress already provided substantial guidance about what amount of fees are reasonable in relation to the amount of back benefits awarded, namely not more than 25 percent. The lodestar method gives the court a meaningful role by allowing them to determine what fees would be reasonable in relation to other factors, such as hours worked or the difficulty of the issues. By forcing courts to focus on fee contracts that uniformly reflect the 25 percent statutory cap, petitioners' methodology renders both the court's role and the statutory phrase "a reasonable fee" largely redundant.

authorize courts to "determine * * * *a reasonable fee*." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999).[13]

Petitioners' assertion that "reasonable" as used in Section 406(b) only permits the court to determine the "outer limit of reasonableness" (Pet. Br. 27 (citation omitted)) would render meaningless the obvious textual differences between Section 406(b)'s authorization for courts to "determine * * * a *reasonable* fee" and the then-existing Section 406(a)'s authorization for the agency to "prescribe * * * *maximum* fees." Moreover, Congress in January 1968 amended Section 406(a) to add authority for the agency to "fix * * * *a reasonable fee*" for work done before the agency. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 173, 81 Stat. 877 (emphasis added). Petitioners' contention that determining "a reasonable fee" means determining only the maximum "non-abusive" fee is thus belied by the 1968 amendments granting the agency, which already had the authority to establish "maximum" fees, the additional power to set "a reasonable fee."

Finally, petitioners' proposed rule also is inconsistent with the statutory text because it renders the 25 percent ceiling an ineffective check on excessive fee awards. Under the lodestar method, courts focus on the reasonableness of fees and consider the amount of

[13] To counterbalance this more intrusive regulation of court-related fee awards, Congress provided for the direct payment of attorney's fees out of the award of back benefits, thereby eliminating the substantial problems lawyers had faced in collecting fees from Social Security claimants, who generally had few if any assets. See 42 U.S.C. 406(b)(1)(A); *Cotter*, 879 F.2d at 360 ("Enacted in part in response to 'inordinately large' contingency fee awards, Congress also sought through section 406 to ensure representation of Social Security disability claimants by providing for payment of a 'reasonable fee' directly from past due benefits.").

work performed and the difficulty of the issues involved. The resulting presumptive fee award is calculated *in dollar terms* and is determined *independently* of the amount of *back benefits awarded.* As a result, the 25 percent ceiling provides a meaningful independent check on the dollar-based fee award. Petitioners' rule, by contrast, would generate the presumptively reasonable fee based on the fee contract, which typically calculates the fee award as a *direct* percentage (25 percent) of the back benefits awarded. Because petitioners' presumptive fee award is not generated independently of the amount of back benefits, the 25 percent of back benefits ceiling provides no meaningful independent check on the fees. At best, district courts would be left to their own devices to determine, for example, that a 20 percent award appears more reasonable than a 25 percent award, and at worst the statute would be rendered meaningless. To avoid this problem in the one context (administrative fees) in which the statute allows attorney's fees to be measured in part based on the contractual terms, the statute provides a dollar cap in addition to the 25 percent ceiling. See 42 U.S.C. 406(a)(2) (administrative fees not to exceed $4000). Thus, in that context, the dollar cap provides a meaningful and independent check on the amount of fees.

B. The Text And Legislative History of Section 406(b) Demonstrates That Congress Did Not Intend Courts To Defer To Attorney-Claimant Fee Contracts

The text of Section 406(b) demonstrates that Congress did not adopt a regime, like that envisioned by petitioners, that gives deference to contractual fee arrangements between the claimant and his attorney. The statute, by its terms, grants courts the authority to

determine the fee, and specifically provides that a contract providing a fee in excess of 25 percent can never be honored by the courts. Congress then removed any doubt on that score by limiting attorneys to the court-determined fee and forbidding any other privately-ordered fee arrangement. 42 U.S.C. 406(b)(2). A rule giving presumptive validity to privately-negotiated fee arrangements is inconsistent with the statute's text.

The legislative history confirms that deference to a 25 percent contingency contract would be contrary to Congress's intent. Congress adopted the fee provision of Section 406(b) in 1965 to prevent the often excessive fees lawyers in social security cases were charging at that time. The Senate Report explained the Committee's findings:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965). Congress thus enacted Section 406(b) as a response to the problem of lawyers charging their Title II clients "inordinately large fees," and Congress cited as examples of such abusive fees contingency contracts calling for payment of "one-third to one-half" of the back benefits. Indeed, petitioners themselves acknowledge

(Pet. Br. 31) that "[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants."

The committee report reflects Congress's concern that lawyers who handle Social Security cases have unequal bargaining power over persons who seek benefits, thus allowing the lawyers to extract unfairly generous terms in their employment contracts. A presumption that the attorney's fee award should be 25 percent of the back benefits because that is what the contract provides is inconsistent with this congressional concern. It is unlikely that Congress, having concluded that agreed-upon attorney's fees that "upon occasion" total 33 percent of the back benefits are abusive, intended a standard that would require courts to uphold attorney's fees of 25 percent (only 8 percent less) in all but the exceptional cases. Congress's desire to outlaw 33 percent fee payments suggests that the 25 percent figure was truly intended as a ceiling and awards of that magnitude should be allowed only in the occasional case where counsel can persuade the court that a fee that high is appropriate based on the particular facts of that case.

The very record that was made below by petitioners suggests that problems with unequal bargaining power continue today. All three contracts in the cases that underlie this petition called for a flat fee of 25 percent of back benefits—the maximum allowed by Congress. Pet. App. 74, 79, 84. Moreover, counsel submitted affidavits from themselves and from other lawyers in various parts of the country, all of which assert that it is the "universal practice" for lawyers throughout the country to obtain agreements from their clients in social security cases on exactly those terms. *Id.* at 56, 60, 88, 89, 91. In other words, Social Security claimants appear

to lack the ability to bargain meaningfully with their lawyers over the price for legal services. Rather, virtually all counsel demand and receive agreements for a fee at the statutory maximum.

Accordingly, those courts that follow petitioners' proposed contingency method are mistaken when they say that "the best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." *Wells* v. *Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990). To the contrary, Congress gave the courts the responsibility of determining a reasonable fee precisely because it concluded that claimants were not able to negotiate attorney's fees freely, but rather were often compelled to agree to "inordinately large" contingent fee arrangements with fixed percentages. See *Kay*, 176 F.3d at 1326 ("Our preference for the lodestar method also reflects the fact that §406(b) is designed to protect a particularly vulnerable class of claimants. Many claimants in Social Security benefits cases are minors, or incompetent to manage their affairs, or disadvantaged by lack of education or by physical or mental impairments.") *Cotter*, 879 F.2d at 360 ("Section 406 is a *parens patriae* limit on the amount of fees an attorney may receive from a disability claimant, usually an individual of limited resources, who suffers the additional handicap of a severe physical or mental disability."). Likewise, the very fact that the prevailing "agreement" nationwide is for the statutory maximum underscores the continuing need for courts to determine reasonable awards independent

of either the amount of back benefits or the fee arrangement "agreed to" by the claimant.[14]

Finally, the Senate Report expressed the particular concern that fee agreements that call for a percentage of the back benefits can generate an excessively high attorney's fee because "litigation necessarily involves" extensive delays that "in many cases" can produce a high award of back benefits and therefore a large percentage fee. Congress recognized the potential for substantial delays, not only for the administrative process, which often requires delays for processing benefits claims and exhausting administrative remedies, cf. *Heckler* v. *Day*, 467 U.S. 104 (1984), but also for the judicial process of reviewing agency determinations regarding benefits, which can involve extensive delays that vary significantly from one district to another. Congress expressly found that such delays make it unfair to allow attorney's fees to be based blindly on a percentage of back benefits because such a method of setting fees can frequently create excessive fees that have little or no relationship to the quality or amount of legal services provided.

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[14] Notably, amicus the Association of Trial Lawyers of America (ATLA) repeatedly concedes that the lodestar method is appropriate "as a proxy for market forces in those situations where no real market exists which serves the statutory purpose." ATLA Br. 10; *id.* at 3 ("The lodestar method provides a means of approximating the market value of legal services in circumstances where market forces cannot be relied upon to further the purposes of the statute."); *id.* at 5 ("[T]he lodestar model is useful in those circumstances * * * where market forces cannot be relied on to set a reasonable fee."). What ATLA and petitioners fail to recognize, however, is that Congress has expressly determined that the market for legal services for Social Security claims is precisely the kind of unreliable market for which the lodestar method is designed.

C. The Lodestar Method Produces A More Reasonable Result Than The Presumptive 25 Percent Contingency Method

The lodestar method of calculating an attorney's fee has the great virtue of looking at the amount of work that counsel actually devoted to a case in determining the proper fee. Logic amply supports the idea, indeed presumption, that a "reasonable" attorney's fee should be based on documentation of the hours that the attorney spent on the case and identification of the fair hourly rate charged by lawyers of similar skill, experience, and reputation in the local market. Under that method, the fee awarded accurately reflects the value of the services rendered by the attorney. By contrast, petitioners' rule that presumptively allows a fee of 25 percent of the back benefits awarded is illogical because it determines whether a fee is reasonable based primarily on factors having much to do with the amount of benefits owed, but little to do with the value of the services actually provided.

Under petitioners' approach, cases involving identical efforts by the attorneys frequently would generate largely disparate fees, depending on such non-fee related factors as the accumulation of accrued benefits due to delay caused by the backlog of cases at each administrative and judicial level of review, the number of dependents a claimant has, and the monthly benefit level that the claimant seeks, which itself varies based on the claimant's income when he was working and the number of years in which he contributed payroll taxes. As the Fourth Circuit rightly observed in *McKittrick*: "The rate of accrual of benefits varies without any relation to the merits of the claim. It is fixed by such things as the claimant's prior earnings and the number of his dependents. The issue in the usual case is

entitlement to benefits; their computation is rarely in question. Unlike personal injury actions, therefore, the amount of the recovery bears no relation to the lawyer's skill, effort or effectiveness." 378 F.2d at 874.

For the same reasons, under petitioners' method, cases with the same amount of back benefits necessarily would produce the same attorney's fees, even when the work that counsel put into the cases varied considerably. Thus, a straightforward case in which counsel filed a short complaint and a short summary judgment memorandum, both containing substantial amounts of boilerplate, would generate the same fee as a case involving novel issues in which counsel had to file lengthy briefs before the magistrate judge, the district court, and the court of appeals, with oral hearings at each level.

Moreover, as some courts have noted, the contingency method creates perverse incentives for attorneys handling Title II claims. "If, in these cases, a contingent fee contract governs the amount of the fee, the dilatory lawyer is given a premium; the prompt, effective lawyer who moves expeditiously is penalized. The regrettable delays in the final adjudication of these claims, in large measure, may be unavoidable, but they should not be compounded by incentives for procrastination and delaying tactics on the part of a claimant's attorney." *McKittrick*, 378 F.2d at 874; see also *Webb*, 472 F.2d at 537. As discussed above, Congress expressly stated that Section 406(b) was intended in part to solve the problem of excessive fees caused by delay. S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965).

Petitioners presumably would allow the court to reduce the fees in cases at the extreme. But it is a strange view of reasonableness that would allow courts routinely to award *different* fees to attorneys doing the

same amount of work and *identical* fees to attorneys doing vastly *different* amounts of work. A statute that calls upon courts to set "a reasonable fee" should not be allowed to produce frequent fees that significantly overcompensate counsel, with the courts stepping in only occasionally when the overcompensation is so great that it becomes egregious. Congress adopted Section 406(b) to protect *all* Social Security claimants and to assure a fair attorney's fee in *all* cases, not simply to eliminate a few extreme cases of excessive fees. After all, "while the attorney's compensation must be sufficient to encourage members of the bar to undertake representation of disability claimants, the disability award, from which the attorney's fee is paid, is normally an already-inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr* v. *Bowen*, 831 F.2d 872, 873 (9th Cir. 1987). A lodestar fee, particularly one that will be paid directly to the lawyer out of the back-benefits award, will encourage sufficient counsel—as it evidently did in each of the cases that underlie this petition, which were all brought despite the Ninth Circuit's well-established use of the lodestar method—without unduly reducing the benefits upon which petitioners rely to meet their daily expenses.

Notably, neither petitioners nor their amici seriously contend that a lodestar approach under Section 406(b) would deny Social Security claimants adequate access to counsel. The provisions of Section 406 providing for direct payment of attorney's fees by the agency out of the award of back benefits, thereby *guaranteeing collection* of fees, provides substantial inducement for attorneys to take Social Security cases. See *Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. 512-513 (1965). Courts in certain

circuits have been applying the lodestar method to Section 406(b) cases for decades. Petitioners have pointed to no evidence suggesting that Social Security claimants in lodestar jurisdictions lack adequate access to counsel, and to the Commissioner's knowledge, no such evidence exists.

D. Using The Lodestar Method To Determine Court-Related Fees Is Consistent With The Methods Set By Section 406(a) For Determining Agency-Related Fees

Petitioners mistakenly argue that a reading of Section 406(b) that would allow only a lodestar calculation of the fee would be inconsistent with what they contend is the more generous contract-based method for calculating attorney's fees for work done in Title II cases at the administrative level, which are governed by 42 U.S.C. 406(a). In fact, Section 406(a) demonstrates that Congress knows how to create a system for awarding fees that gives presumptive weight to a private agreement when it wants to and confirms the appropriateness of applying the lodestar method to determine court-related fees.

Section 406(a) provides two methods by which counsel representing Social Security claimants before the agency can obtain fees. The first method, known as the fee petition process, is provided for in 42 U.S.C. 406(a)(1), which authorizes the Commissioner to "fix * * * a reasonable fee" for the attorney's services. Under the Commissioner's regulations governing this process, the attorney must submit a fee petition setting forth a detailed description of the services provided and expenses incurred in representing the claimant before the agency. The agency official who authorizes the fee, typically an administrative law judge (ALJ), then evaluates the information in the petition and sets a

reasonable fee to reflect the value of the legal services provided. The ALJ will "not base the amount of fee [he] authorize[s] on the amount of the [back] benefit alone, but on a consideration of all the factors listed in" the regulations, which are similar to traditional lodestar factors and include "[t]he complexity of the case," "[t]he level of skill and competence required" of the attorney, and "[t]he amount of time * * * spent on the case." 20 C.F.R. 404.1725(b)(ii), (iii), and (iv).

The second process by which an attorney can get fees for representing a claimant before the agency is known as the fee agreement process and is governed by 42 U.S.C. 406(a)(2). Under this process, if the claimant and his attorney sign and submit a written fee agreement before the agency renders a favorable determination on the claim, the agency will generally approve the agreement if the fee specified therein does not exceed a statutory cap, which is the lesser of 25 percent of the claimant's past due benefits or $4000.[15]

Petitioners contend (Pet. Br. 21) that using the lodestar method to determine court-related fees would be inconsistent with 406(a)(2)'s fee agreement process, which they characterize as "authoriz[ing] awards based on contingent fees for legal representation in the administrative process." But the differences between the fee agreement process of Section 406(a)(2) and court-determined fees under Section 406(b) (or for that matter the fee petition process of Section 406(a)(1)) reflect the markedly different statutory terms gov-

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[15] Under 42 U.S.C. 406(a)(2)(A)(iii), the Commissioner may increase the $4000 limit to reflect the rate of increase in primary insurance amounts since January 1, 1991. Effective February 1, 2002, the Commissioner has set the new limit at $5300. See 67 Fed. Reg. 2477 (2002).

erning the different fee-setting processes. Congress created the fee agreement process of Section 406(a)(2) as an *alternative* to the Commissioner's authority to determine "a reasonable fee" through the fee petition process of Section 406(a)(1), and it had to amend Section 406(a) to provide this alternative precisely because, as the agency's regulations have long recognized, the Commissioner's authority to fix "a reasonable fee" required the agency to undertake an independent evaluation of the value of the legal services provided, rather than merely presume that the contractual fee was the reasonable fee. Accordingly, the distinct nature of the Section 406(a)(2) fee agreement process reflects its distinct role in that statutory scheme. Just as it has no relevance to the Commissioner's implementation of Section 406(a)(1)'s requirement of determining a "reasonable" fee, it has no relevance to the method courts should use in determining a "reasonable" fee under Section 406(b).

In any event, the fee agreement process is not as generous to counsel as petitioners make it seem. On its face, the fees under this expedited option cannot exceed $4000. Moreover, if a case is resolved favorably to the claimant at the administrative level, without the need to seek judicial review and the attendant delay, it is likely that the back-benefits award will be far lower than after litigation, and thus 25 percent of those benefits would produce a significantly smaller fee. In those cases where counsel expect that the claim will generate especially large amounts of back benefits, counsel would likely avoid application of Section 406(a)(2)'s $4000 cap, and seek certification of "a reasonable fee" by the Commissioner under Section 406(a)(1)'s fee petition process. But as discussed above, any fee awarded through that process would not be based on the contingency contract, but would be set independently by the agency to reflect the value of the legal services based upon the factors set forth in 20 C.F.R. 404.1725(b). Moreover, a claimant can timely challenge a fee as excessive in light of the actual services performed. See 42 U.S.C. 406(a)(3).

Finally, more than anything else, the fee agreement process in Section 406(a)(2) demonstrates that Congress knew how to write a statute making the contract between the attorney and claimant presumptively binding subject to a ceiling. Congress did so expressly in Section 406(a)(2) as an alternative to the reasonable fee determination process of Section 406(a)(1). Whatever anomalies may be produced by the fact that Section 406(a)(2) adopts a different regime than the procedures for fees in court cases under Section 406(b), petitioners cannot explain how this Court could (let alone should) harmonize the two modes of awarding fees in light of the starkly different statutory language.

E. Neither A Presumptive 25 Percent Fee Award Nor A Risk Enhancement Of Lodestar Awards Is Appropriate To Reflect The Contingent Nature Of The Fee Awards

Petitioners mistakenly contend (Pet. Br. 34-36) that the lodestar method is inappropriate for Title II litigation because of the contingent nature of fee awards under Section 406(b). In *Blanchard*, however, this Court reaffirmed the general applicability of the lodestar method to attorney's fee claims, including contingent ones, stating: "We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement. To the contrary, in *Hensley* and in subsequent cases, we have adopted the lodestar approach as the centerpiece of attorney's fee

awards." 489 U.S. at 94. Although *Blanchard* left open the possibility that contingency could be a factor considered by the court in determining whether to enhance a lodestar calculation—a possibility since foreclosed by this Court's decision in *Dague*, 505 U.S. at 563-566—the *Blanchard* Court held that neither contingency nor any other factor "is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." 489 U.S. at 94.

As an alternative to their proposed presumption in favor of a 25 percent attorney's fee, petitioners argue (Pet. Br. 42-47) that if the Court adopts a lodestar analysis, it should allow an enhancement of fee awards in social security cases *as a class* to reflect the risk inherent in such cases. There would appear to be little if any practical difference between these two proposals.[16] But any method of calculating fees that increases the fee beyond the base lodestar to reflect the contingent nature of Section 406(b) claims would be improper for the same basic reasons this Court rejected a contingency enhancement for fee-shifting statutes in *Dague*. That is true, moreover, whether the contingency enhancement is based on the riskiness of Section 406(b) claims as a class, as petitioners contend it should

[16] The lodestar fee calculations in these three cases (before the mandatory offset for the EAJA fee awards) were $3135.00 (*Gisbrecht*), $5461.50 (*Miller*), and $6550 (*Sandine*). Pet. App. 18, 31, 40. Petitioners had asked for the maximum award of 25 percent of back benefits, which would have been $7091.50, $7514, and $13,988 respectively. See Pet. Br. 8. Petitioners never give a figure as to the size of the risk enhancement they seek, but even if an enhancement is limited to doubling the lodestar (which would only partially reflect their asserted 35 percent success rate in social security cases), that would bring these three awards near to or well over the 25 percent statutory maximum.

be, or whether the contingency enhancement is based on the riskiness of the particular case, as the Ninth Circuit has held, see *Allen*, 48 F.3d at 460.[17]

The Court in *Dague* articulated several reasons for rejecting both general and case-specific contingency enhancements for fee-shifting statutes, and those reasons are equally applicable to Section 406(b). The *Dague* Court rejected a contingency enhancement based on the riskiness of the particular case both because it "would likely duplicate in substantial part factors already subsumed in the lodestar," and because it would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." 505 U.S. at 562-563; see also *id.* at 563 ("[E]nhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately

[17] Although a number of circuits applying the lodestar method to Section 406(b) claims have held that courts may consider contingency in determining whether an enhancement is warranted, only the Ninth and Eleventh have addressed the issue post-*Dague*. See *Allen*, 48 F.3d at 460 (applying only case-specific contingency factor); *Kay*, 176 F.3d at 1327 & n.5 (permitting consideration of contingency as an enhancement factor, but emphasizing "its presence in a given case would not necessarily require an adjustment in order to produce a reasonable fee; the lodestar amount itself may suffice"). Those decisions are flawed. Fee-shifting statutes like those at issue in *Dague* closely resemble Section 406(b), in that both (1) authorize "reasonable attorney * * * fees," and (2) only if the plaintiff prevails. The difference that *Allen*, *Key*, and petitioners emphasize—that fee-shifting statutes impose fees on another party who has not negotiated a fee arrangement, while Section 406(b) directs the fees to come from the claimant who has agreed to a fee—is of little impact in light of Congress's determination that fee "agreements" in this area are distorted. See *supra* at 20-22.

encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the 'reasonable fees' provisions."). Both of these reasons apply equally to Section 406(b) claims.

The *Dague* Court also noted that a general class-based enhancement would be difficult to apply, especially in the absence of a functioning, unregulated market for such fees. 505 U.S. at 564. In addition, such an enhancement would "pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail," thereby violating at least the spirit of the "prevailing party" requirement; deviate from the consistent trend of Supreme Court cases "turn[ing] away from the contingent-fee model"; and frustrate both the "interest in ready administrability that has underlain our adoption of the lodestar approach" and "the related interest in avoiding burdensome satellite litigation." *Id.* at 565-566; see also Pet. App. 9 (noting petitioners are "'essentially asking victorious claimants to "subsidize" the claims of losing claimants' by 'tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants'") (citation omitted). Again, each of those concerns applies with full force to attorney's fee claims under Section 406(b).

Notwithstanding *Dague*, petitioners contend (Pet. Br. 44) that Section 406(a) warrants a contingency enhancement, even though fee-shifting statutes do not, because "[t]he primary purpose of fee-shifting statutes is to assure the availability of counsel," whereas Section 406(b) "was adopted to assure that the attorneys already representing [Title II] claimants did not collect 'inordinately large' legal fees." That statement, while true, provides an additional reason for *rejecting* a contingency enhancement, not a reason for adopting one. As petitioners themselves concede (Pet. Br. 31),

"[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants." Because the contingency enhancement that petitioners propose would systematically *reduce* claimants' net benefits, that purpose counsels strongly against any contingency enhancement for fee claims under Section 406(b).

Similarly mistaken is petitioners' argument (Pet. Br. 35-36) that absent an enhancement the relatively low rate of success of Title II judicial challenges would result in an hourly rate substantially below the average market rate for lawyers of comparable seniority and skill that handle other types of cases. As petitioners themselves point out (Pet. Br. 34-35), Title II cases are "unique" in that they often are less complicated than other types of litigation, are generally resolved on summary judgment, and typically involve fewer than 40 hours of legal work. Accordingly, that rates for Title II representations may be less than rates for more complicated litigation is not necessarily a reason for an enhancement.

Petitioners' analysis, moreover, ignores that Section 406(b) fees generally are paid directly to the lawyers out of the award of back benefits, thereby eliminating many of the risks and other costs typically associated with collecting fees. This increased certainty of payment, which Congress intended as the primary assurance that attorneys would undertake Title II representations, was part of the balance that Congress struck when it limited the size of Section 406(b) fees. This direct-payment feature may be one reason why there does not appear to be any documented shortage of lawyers willing to take Title II cases. Petitioners, who themselves undertook the representations in this case in a lodestar jurisdiction without a reasonable

expectation of an enhancement (see Pet. Br. 46), have provided no basis for diverting much needed benefits away from Social Security claimants to provide an additional inducement to attorneys in the form of a contingency enhancement.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, and DONALD L. ANDERSON,

Petitioners,

vs.

LARRY G. MASSANARI,
Acting Commissioner of Social Security,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. The Commissioner Makes Several Tacit Concessions.

The Respondent, the Acting Commissioner of Social Security (Commissioner), opposes granting the petition for a writ of certiorari despite the split in Circuits between the use of the lodestar and contingent fee methods of calculating attorney fees under 42 U.S.C. § 406(b), for attorneys for plaintiffs for benefits under Title II of the Social Security Act.[1] (Br. for the Resp't in Opp'n (Br. Resp't) at 8-19.) Before explaining why the Commissioner's arguments do not justify denying the petition, Petitioners pause and identify several of the Commissioner's tacit concessions that weaken the Commissioner's opposition to granting the petition.

A. The Lodestar Method Will Ordinarily Undercompensate An Attorney For A Title II Plaintiff.

The Commissioner does not dispute that 42 U.S.C. § 406(b)(1) criminalizes charging a Title II plaintiff a non-

[1] *Compare Coup v. Heckler*, 834 F.2d 313 (3d Cir. 1987) (lodestar method); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324 (4th Cir. 1989) (same); *Brown v. Sullivan*, 917 F.2d 189 (5th Cir. 1990) (same); *Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989) (same); *Gisbrecht v. Apfel*, 238 F.3d 1196 (9th Cir. 2000) (same); *Hubbard v. Shalala*, 12 F.3d 946 (10th Cir. 1993) (same); *Kay v. Apfel*, 176 F.3d 1322 (11th Cir. 1999) (same), *with Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990) (*Wells II*) (contingent fee method); *McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989) (same); *Rodriquez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (same).

contingent attorney fee. (Br. Resp't at 2 & 12 n.12.) Nor does the Commissioner dispute the common-sense proposition that, as a general matter, an attorney who charges a plaintiff a contingent fee will charge a higher fee than an attorney who charges a plaintiff a non-contingent fee. Further, the Commissioner does not dispute that, in the typical case, the lodestar method of calculating a reasonable attorney fee for the purpose of § 406(b) prohibits an attorney from charging a higher fee reflecting the contingent nature of that fee. Further, the Commissioner does not deny that, in the typical case, the lodestar method of calculating the contingent fee that § 406(b) requires undercompensates an attorney for a Title II plaintiff.[2] Rephrased, the Commissioner tacitly concedes that, in the typical case, the lodestar method of calculating attorney fees under § 406(b) essentially dictates that an attorney for a Title II plaintiff must work pro bono to the extent that the contingent attorney fee that § 406(b) requires does not reflect the contingent nature of that fee.

The Commissioner's tacit concession that the lodestar method ordinarily undercompensates an attorney for a Title II plaintiff is significant. However laudable the goal of pro bono advocacy, when enacting § 406(b), Congress did not mandate that attorneys for Title II plaintiffs should ordinarily be undercompensated. Instead, when Congress limited an attorney fee for a Title II plaintiff to "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits," 42 U.S.C.

[2] The lodestar method only accounts for the contingent nature of a fee in the unusual case. *See, e.g., Allen v. Shalala*, 48 F.3d 456, 460 (9th Cir. 1995).

§ 406(b), Congress sought to prohibit overcompensation, i.e., "inordinately large fees." S. Rep. No. 404, 89th Cong., 1st Sess. U.S.C.C.A.N. 305, 2062 (1965).

B. As The Purported "Trustee" For Title II Plaintiffs, The Commissioner Is Not Seriously Troubled By The Application Contingent Fee Method In The Second, Sixth, And Seventh Circuits.

The Commissioner has assumed the self-appointed role in this litigation (and in other litigation over attorney fees under § 406(b)) as the "trustee for the benefits claimant."[3] (Br. Resp't at 4 n.3.) As the purported trustee for Title II plaintiffs nationally, the Commissioner must be concerned with the determination of attorney fees for Title II plaintiffs in Circuits utilizing the contingent fee method as well as the lodestar method. Even though the contingent fee method is law in the Second, Sixth, and

[3] *Compare Wells II*, 907 F.2d at 371 ("Finally, accepting reasonable contingency agreements substantially reduces the anomalous role of the Social Security Administration in first denying benefits to a claimant, and then after losing the case, posing as a protector of the plaintiff, but spending more time and money in order to reduce the fees to be paid to the claimant's attorney."). As a structural matter, the Commissioner's opposition to paying Petitioners' attorneys what Petitioners had agreed to pay Petitioners' attorneys is not purely benevolent. By litigating that attorneys for Title II plaintiffs should normally be undercompensated via the lodestar method, the Commissioner obviously tries to make uneconomic or less economic attorney representation of Title II plaintiffs precisely in those cases in which attorney representation is most needed to overturn erroneous agency denials of benefits.

Seventh Circuits, the Commissioner is not troubled by this rule enough to ask this Court to require nationwide application of the lodestar method. (Br. Resp't at 11.) Instead, the Commissioner remarks that "any unfairness" to plaintiffs in the Second, Sixth, and Seventh Circuits is "ameliorated somewhat by the fact that claimants can generally receive at least what they bargained for." (Br. Resp't at 11.) The Commissioner's relative comfort with the contingent fee method in three Circuits is evidence that, in the Commissioner's view as the purported "trustee" for Title II plaintiffs in those Circuits, the contingent fee method does not cause serious injustice or unfairness. Further, the Commissioner's comfort with the contingent fee method in three Circuits is evidence that § 406(b) itself protects adequately Title II plaintiffs when an attorney fee under § 406(b) is calculated using the contingent fee method.

II. There Is A Significant Difference Between The Lodestar Method And The Contingent Fee Method.

The Commissioner opposes granting the petition to resolve the split in the Circuits between the lodestar and contingent fee methods because the difference between the lodestar and contingent fee methods is not significant enough: "Moreover, the ways in which the two different rules operate in practice, which vary somewhat from circuit to circuit, substantially reduce the actual effect of the difference between the two approaches." (Br. Resp't at 8.) The Commissioner's survey of Circuit law does not justify this conclusion.

The Sixth Circuit employs the contingent fee method. *Rodriquez*, 865 F.2d at 744-47. The Commissioner contends that the contingent fee method in the Sixth Circuit is tempered by the Sixth Circuit's recognition of circumstances in which a plaintiff's agreement to pay his or her attorney twenty-five percent of retroactive benefits should not be enforced. (Br. Resp't at 10.) In the Sixth Circuit, deductions from a presumptive award of twenty-five percent of retroactive Title II benefits "generally should fall into two categories: 1) those occasioned by improper conduct or ineffectiveness of counsel; and 2) situations in which counsel would otherwise enjoy a windfall because of either an inordinately large benefit award or from minimal effort expended." *Id.* at 746 (quoted in part in Br. Resp't at 10). But even after more than a decade of experience with the contingent fee method in the Sixth Circuit, the Commissioner does not allege that such deductions are common. Therefore, the deductions mentioned in *Rodriquez* do not have the practical effect of making the contingent fee method approximate the lodestar method in the Sixth Circuit.

The Seventh Circuit also uses the contingent fee method. *McGuire*, 873 F.3d at 977-83. The Commissioner speculates that the Seventh Circuit "might refuse to enforce" contingent fee agreements "on a routine basis." (Br. Resp't at 10.) For this, the Commissioner notes that attorneys may universally seek twenty-five percent of back benefits as a contingent fee. (Br. Resp't at 10.) The Commissioner further points to the Seventh Circuit's statement that a contract for a contingent fee should not be enforced if, "for instance, there is evidence that the client did not know she could negotiate other terms than

a twenty-five percent contingency. . . . " *McGuire*, 873 F.3d at 981 (quoted in Br. Resp't at 10). Again, there is more than a decade of experience with the contingent fee method in the Seventh Circuit. The Commissioner does not claim that during this decade the Seventh Circuit has found a general problem with enforcing contingent fee agreements. (Br. Resp't at 10.) Nor does the Commissioner assert that attorneys within the Seventh Circuit have been misleading Title II plaintiffs. Further, the Commissioner does not state that he has sought or will likely seek en banc review in the Seventh Circuit of *McGuire*'s contingent fee method.[4] Therefore, there is a significant difference between the Seventh Circuit's use of the contingent fee method and the lodestar method.

Finally, the Commissioner weakly asserts that the contingent nature of a contingent fee under § 406(b) may be considered under the lodestar method itself. (Br. Resp't at 11 (citing *Allen*, 48 F.3d at 460).) Yet, the Commissioner does not seriously maintain that consideration of the contingent nature of an attorney fee under the lodestar method even roughly approximates the attorney fee calculated using the contingent fee method. (Br. Resp't at 11.) Nor does the Commissioner represent that those Circuits that use the lodestar method erroneously fail to give adequate consideration to the contingent nature of an attorney fee under § 406(b). Instead, the Commissioner advocates the lodestar method precisely

[4] As a related matter, the Commissioner does not state that he has sought or will likely seek en banc review in the Second Circuit of *Wells II*'s contingent fee method. *See Wells II*, 907 F.2d at 369-72.

because it gives much less weight to the contingent nature of an attorney fee under § 406(b). (Br. Resp't at 14-15.)

III. The Question Is Ripe For Review.

Notwithstanding the split in the Circuits, the Commissioner argues against immediate review of the question presented. (Br. Resp't at 8-19.) For this, the Commissioner minimizes the "practical" difference between the lodestar and contingent fee methods. (Br. Resp't at 10-11.) The Petitioners have already criticized that rationale.

While the Commissioner posits that the "trend" in the law is towards the lodestar method, the Commissioner does not maintain that this trend will cause the Second Circuit or the Sixth Circuit to abandon the contingent fee method. (Br. Resp't at 9-10.) And with regard to the Seventh Circuit, the Commissioner does not speculate that it will abandon entirely the contingent fee method. (Br. Resp't at 10.) In other words, a split will remain in the Circuits between those that use the lodestar method and those that use the contingent fee method.

The Circuits have been split for more than a decade regarding whether the lodestar method or the contingent fee method should be used to determine the amount of an attorney fee under § 406(b). There is thus sufficient experience upon which to decide which method is appropriate. Further litigation in the lower courts is not needed to discover the advantages and disadvantages of the two methods. Nor is there any legislation likely to clarify the

intent of Congress. For these reasons, the question presented is ripe for review.

IV. The Question Presented Is Important.

In Fiscal Year 2000, there were about 15,000 civil actions involving benefits under Title II and/or Title XVI of the Social Security Act.[5] Therefore, the question presented[6] is important each year to thousands of plaintiffs and potential plaintiffs for Title II benefits as well as to thousands of attorneys who represent Title II plaintiffs or who might represent Title II plaintiffs.

A plaintiff may proceed pro se, but is obviously better off with skilled attorney representation. The ability of a plaintiff to obtain skilled attorney representation is related, in part, to the compensation an attorney may receive for representing the plaintiff. *See Wells II*, 907 F.3d at 372 ("Thus, accepting reasonable contingency agreements as the basis for a § 406(b) social security fee provides a critical incentive for able attorneys to practice in the social security field and increases the likelihood that a claimant can find an attorney sufficiently committed and skilled to litigate successfully against the government."). If the contingent fee method is the proper method to

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[5] *See Federal Court Management Statistics* (2000), *available at* http://www.uscourts.gov/cgi-bin/cmsd2000.pl.

[6] The question presented is whether, when determining a "reasonable" attorney fee to be paid by the plaintiff to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b), a court may give no effect to the plaintiff's contract to compensate plaintiff's attorney in terms of a contingent fee taking into account the contingent nature of the fee.

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calculate attorney fees under § 406(b), this Court should grant the petition to enhance the ability of a Title II plaintiff to obtain skilled attorney representation.

On the other hand, if the lodestar method is the proper method to calculate attorney fees under § 406(b), this Court should grant the petition to ensure the uniformity of law. If Congress mandated that attorneys for Title II plaintiffs be undercompensated – a necessary consequence of requiring a contingent fee but prohibiting routine consideration of the contingent nature of the fee when determining the amount of the fee – then attorneys for all Title II plaintiffs should labor under the same rule however harsh.

CONCLUSION

For the reasons given above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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vs.

JO ANNE B. BARNHART, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether, when determining a "reasonable" attorney fee to be paid by the plaintiff to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b), a court may give no effect to the plaintiff's contract to compensate plaintiff's attorney in terms of a contingent fee taking into account the contingent nature of the fee even when the contingent fee requested is within the statutory limitation of 42 U.S.C. § 406(b) for an attorney fee not to exceed "25 percent of the total of the past-due benefits," even when it is a criminal offense for an attorney to charge a non-contingent fee, and even when the contingent fee sought is consistent with the prevailing market rate.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 238 F.3d 1196 (9th Cir. 2000), and is set out at pages 1-11 of the Petitioners' Appendix (Pet'r App.). The order of the court of appeals denying rehearing and hearing en banc, which is not officially reported, is set out at pages 43-44 of Petitioners' Appendix. The underlying decision of the United States District Court for the District of Oregon in *Gisbrecht v. Apfel*, No. CV-98-0437-RE (D.Or. Apr. 14, 1999), is not published. (Pet'r App. 17-22.) The Magistrate Judge's report and District Court's decision in *Miller v. Apfel*, No. CV-96-6164-AS (D.Or. Mar. 30, 1999), are also unreported. (Pet'r App. 23-32.) The Magistrate Judge's report and District Court's decision in *Sandine v. Apfel*, No. CV-97-6197-ST (D.Or. June 18, 1999), are likewise unreported. (Pet'r App. 33-41.)

JURISDICTION

The judgment of the Ninth Circuit was entered November 27, 2000 and modified for publication on January 22, 2001. (Pet'r App. 1-11.) A timely petition for rehearing and suggestion for rehearing en banc was denied on April 20, 2001. (Pet'r App. 42-43.) The petition for a writ of certiorari was filed on July 19, 2001. On November 26, 2001, certiorari was granted with respect to Petitioners Gary E. Gisbrecht, Barbara A. Miller, and Nancy Sandine (and denied with respect to Petitioner

Donald L. Anderson). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are set out in the appendix to this brief.

STATEMENT OF THE CASE

Title II of the Social Security Act provides for old-age, survivor, and disability benefits for insured individuals irrespective of financial need. *See* 42 U.S.C. §§ 402, 423. Insured status is acquired by paying Social Security taxes. 42 U.S.C. §§ 413-414, 416(i). Old-age benefits are the well-known retirement benefits. 42 U.S.C. § 402. Survivors benefits are paid to certain family members of a deceased worker who paid Social Security taxes. *Id.* Disability benefits are paid to insured individuals who meet the statutory definition of disability, i.e., an inability to engage in any substantial gainful activity. 42 U.S.C. §§ 402, 423. The most common disability benefits awarded under Title II are Disability Insurance Benefits (DIB). 42 U.S.C. § 423.[1]

[1] Title XVI of the Social Security Act, a welfare program, provides Supplemental Security Income (SSI) benefits to financially needy individuals who are aged, blind, or disabled regardless of their Title II insured status. An individual may apply for both Title II and Title XVI benefits.

ADMINISTRATIVE PROCEEDINGS

The underlying merits claims of Petitioners Gary E. Gisbrecht, Barbara A. Miller, Nancy Sandine, and Donald L. Anderson[2] involved claims for Title II disability benefits. Gisbrecht applied for DIB in January 1994, stating that he had been disabled since August 1993, due to a closed-head injury sustained when he was struck by a car.[3] Gisbrecht had organic brain damage, a seizure disorder, and anxiety. Miller applied for DIB in March 1993, alleging disability since January of that year. Miller had a cardiac condition for which she had bypass surgery; she also had a bleeding disorder, diabetes mellitus, and some depression.[4] Sandine applied for DIB in July 1993, claiming disability since December 1988. Sandine had peripheral vascular disease with stenosis of the carotid artery, a cervical-spine fusion, degenerative joint disease of the cervical spine, and several other impairments. All claimants asserted and the courts held that they were disabled.

After Gisbrecht's, Miller's, and Sandine's applications were denied administratively both initially and on reconsideration, each requested a de novo hearing before an administrative law judge (ALJ). At their oral hearings before the ALJs, Gisbrecht and Miller were represented by non-attorneys.[5] An ALJ ultimately decided that Gisbrecht had been disabled from August 1993 until January

[2] Certiorari was denied with respect to Petitioner Donald L. Anderson. We will mention Anderson only in passing.

[3] Gisbrecht also applied for SSI.

[4] Miller also applied for SSI.

[5] Sandine had an attorney at her ALJ hearing.

1996, but not thereafter, and thus denied any Title II benefits based on a disability after that date. Other ALJs decided that Miller and Sandine had never been disabled and thus denied their applications entirely. Gisbrecht, Miller, and Sandine exhausted their administrative remedies by requesting review by the Social Security Administration's Appeals Council.[6]

Gisbrecht's, Miller's, and Sandine's requests for Appeals Council review were denied, respectively, in March 1998, April 1996, and June 1997. From application through the Appeals Council, Gisbrecht, Miller, and Sandine spent on average more than three and one-half years exhausting their administrative remedies.

PROCEEDINGS IN THE DISTRICT COURTS

Gisbrecht, Miller, and Sandine had a right to seek judicial review of the administrative denials of their applications for benefits. 42 U.S.C. § 405(g). Each retained a firm comprised of attorneys Ralph Wilborn, Etta L. Wilborn, and Tim Wilborn.[7] Within five months of the filing of the complaints in all three cases, Petitioners'

[6] At the Appeals Council, Gisbrecht was represented by attorney Ralph Wilborn of Ralph Wilborn and Etta L. Wilborn, P.C. In June 1999, the Social Security Administration authorized Ralph Wilborn to collect from Gisbrecht an attorney fee of $2,000 under 42 U.S.C. section 406(a) for work before the Appeals Council.

[7] Ralph and Etta are husband and wife. Ralph and Tim are brothers.

attorneys filed merits briefs explaining why the Petitioners were entitled to benefits.[8]

In *Gisbrecht*, the Commissioner agreed that Gisbrecht's disability did not cease, but continued after January 1996. The merits were resolved entirely in Gisbrecht's favor within seven months of his complaint, with reinstatement of benefits ordered. In *Miller*, the Commissioner opposed a judicial finding of entitlement to benefits; the Commissioner did suggest, however, that the court remand Miller's case for further administrative proceedings. Miller's attorneys opposed such a remand, urging that the court itself award benefits. Six months later, the district judge awarded Miller benefits when she adopted a magistrate judge's report that recommended an award of benefits. In *Sandine*, the Commissioner argued for affirmance, but a magistrate judge recommended that the court find Sandine entitled to benefits. Without further objection, the district judge adopted that recommendation, resolving the merits litigation favorably to Sandine within ten months of the filing of her complaint. The merits litigation in *Gisbrecht*, *Miller*, and *Sandine* was completed on average in about ten months.

As a result of the favorable judgments, Gisbrecht, Miller, and Sandine became entitled to, respectively, $28,366.00, $30,056.00, and $55,952.00 in past-due Title II benefits. (Pet'r App. 19, 30, 33.) In addition to past-due benefits, Gisbrecht, Miller, and Sandine were entitled to

[8] In the District of Oregon, a plaintiff seeking Social Security benefits does not file a motion for summary judgment or a motion for judgment on the pleadings, but instead files a memorandum supporting a petition for judicial review.

continuing Title II benefits until they died, were no longer disabled, or reached retirement age (sixty-five years of age).[9] The Commissioner withheld 25% of the past-due Title II benefits awarded pending a judicial determination of any motion for attorney fees fee pursuant to 42 U.S.C. § 406(b).

After the merits litigation was over in *Gisbrecht*, *Miller*, and *Sandine*, Petitioners' attorneys first moved the district courts to award attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The district courts utilized the lodestar method to calculate the EAJA fees and awarded attorney fees under the EAJA of $3,339.11 (25.08 hours x $133.14 per hour), $5,164.75 (39.91 hours x $129.41 per hour), and $6,836.10 (52.4 hours x $130.46 per hour) in, respectively, *Gisbrecht*, *Miller*, and *Sandine*. (Pet'r App. 17, 27, 33.)

Following the determination by the Commissioner of the amount of past-due Title II benefits, Petitioners' attorneys moved the district courts to award attorney fees under 42 U.S.C. § 406(b), to be paid out of Gisbrecht's,

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[9] The value of any future benefit is related to the monthly benefit. Gisbrecht's monthly Title II benefit in January 1999 was $1,011.00. Gisbrecht was forty-three years old in January 1999 when his past-due benefits were calculated. Miller's monthly benefit in December 1997 was $830.60. Miller was fifty-three years old in July 1998 when her past-due benefits were calculated. (Miller did not need her court case to establish entitlement to future benefits. While her case was pending in court, the agency found her disabled based on a new application.) Sandine's monthly benefit in December 1998 was $898.40. Sandine was fifty-nine years old in February 1999 when her past-due benefits were calculated.

Miller's, and Sandine's past-due Title II benefits. In support of their motions for the section 406(b) fees, Petitioners' attorneys filed three legal memoranda each in *Miller* and *Sandine* and two in *Gisbrecht* and submitted the employment agreements, affidavits from themselves, affidavits from other Social Security practitioners, statistical data regarding the risk of loss in Social Security civil actions, and statistical data regarding the marketplace in Oregon for legal services paid on a contingent-fee basis. (Pet'r App. 44-98.) In *Gisbrecht*, *Miller*, and *Sandine*, the Commissioner filed memoranda opposing, in part, the motions for the section 406(b) fees. In *Miller* and *Sandine*, magistrate judges issued reports recommending paying section 406(b) fees consistent with the Commissioner's arguments. (Pet'r App. 27, 33.) Petitioners' attorneys objected to those reports.[10]

Because there is a dollar-for-dollar offset of any section 406(b) fee against any EAJA fee, if a district court grants a motion for a section 406(b) fee in an amount equal to or less than an EAJA fee, the attorney will not net any additional attorney fee from the section 406(b) motion. All three section 406(b) motions were for that reason unsuccessful. The district courts used the lodestar method to calculate both the EAJA fees and the section 406(b) fees. (Pet'r App. 19, 30, 35.) Because the EAJA awards in *Gisbrecht* and *Sandine* exceeded the section 406(b) lodestar calculations, Gisbrecht and Sandine paid no out-of-pocket section 406(b) fee. (Pet'r App. 17, 22, 33, 40.) In *Miller*, the amount of the section 406(b) lodestar

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[10] In *Gisbrecht*, Petitioners' attorneys' section 406(b) motion was not referred to a magistrate judge.

exceeded the court's EAJA award by only $296.75, so that is the only additional fee the attorneys received by virtue of section 406(b). Gisbrecht, Miller, and Sandine each had agreed to pay his or her attorneys – 25% of past-due Title II benefits or, respectively, for Gisbrecht, Miller, and Sandine, $7,091.50, $7,514.00, and $13,988.00. (Pet'r App. 72-86.) The EAJA and section 406(b) fee litigation in the district courts took on average about nine months to resolve, approximately the same length of time as was required by the merits.

PROCEEDINGS ON APPEAL

Petitioners' attorneys appealed the section 406(b) awards in *Gisbrecht*, *Miller*, Sandine, and *Anderson*[11] to the Ninth Circuit, and the Ninth Circuit consolidated for decision the four appeals. In an unpublished decision on November 27, 2000, the Ninth Circuit affirmed the district courts' section 406(b) awards in all respects. (Pet'r App. 5-11.) The Ninth Circuit reaffirmed that the lodestar method must be used to determine a section 406(b) fee. (Pet'r App. 6.) Further, the Ninth Circuit held that the lodestar method requires the utilization of a specific hourly rate, regardless of whether, in the private marketplace, the prevailing market rate is based on a percentage of the recovery, e.g., 25% of past-due benefits. (Pet'r App. 7.)

On January 22, 2001, the Commissioner's motion to publish the November 27, 2000 decision was granted, and

[11] This Court denied Anderson's petition for a writ of certiorari.

the mandate was issued. Miller, Gisbrecht, Sandine, and Anderson moved the Ninth Circuit to withdraw its mandate and then petitioned the Ninth Circuit for rehearing with a suggestion for rehearing en banc. In an unpublished order on April 20, 2001, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. (Pet'r App. 43.)

SUMMARY OF ARGUMENT

I. Prior to the enactment of section 406(b), federal courts doubted that they had the authority to review the size of legal fees under contingent fee agreements made by Title II claimants. As a consequence, many of those agreements prior to 1965 required claimants to pay their attorneys 50% of all back benefits awarded.

Congress adopted section 406(b) for the purpose of protecting claimants from "inordinately large fees." The statute does so by imposing a cap of 25%, and by requiring as well that federal courts assure that the amount of fees to be paid within that limitation remains "reasonable".

The reasonableness review mandated by section 406(b) is the same authority that state courts long exercised to assure that contingent fees were not excessive. That traditional reasonableness review fully satisfies the congressional purpose of avoiding inordinately large fees. Congress cannot be assumed to have intended to intrude further into the attorney-client relationship than is necessary to address that statutory purpose or than was traditional in judicial scrutiny of contingent fees.

The lodestar method of calculating fees under fee-shifting statutes is ordinarily necessary because there is no agreement regarding the amount of the fee to be paid to the prevailing party. If, however, a plaintiff and defendant agreed that the fee owed to the prevailing party would be a fixed percentage of the damages awarded, a court would ordinarily accept that agreement rather than engage in a lodestar calculation.

In a Title II case the transactional costs of lodestar litigation would often be unduly burdensome. Title II cases on average involve only about forty hours of legal work on the merits. The additional time and effort required to litigate a disputed lodestar calculation will frequently be quite substantial in comparison. In the instant cases the attorneys sought fees from their clients totaling $13,253.54. The litigation over that dispute required the filing of eleven legal memoranda, a series of affidavits and other documents, lasted nine months, and resulted in five opinions at the district court level alone. The fee litigation was comparable in size and duration to the litigation of the merits.

The traditional and more limited reasonableness review of contingent fees is far more expeditious and appropriate than a lodestar calculation for the small fees typical of Title II cases.

II. At the time when section 406(b) was adopted, federal and state courts routinely and without difficulty considered contingency in determining what fee should be paid to an attorney in the absence of a specific fee agreement. That same methodology can and should be applied to section 406(b).

This Court's decision in *City of Burlington v. Dague*, 505 U.S. 557 (1992), rejected a contingency enhancement only in the context of the type of fee-shifting statute there at issue. Many of the concerns underlying the decision in *Dague* are inapplicable to section 406(b). In a case such as this in which the fee will be paid by the successful client, a contingency enhancement appropriately awards a larger fee against a client whose claim entailed a greater risk of failure.

ARGUMENT

I. WHERE A CONTRACT BETWEEN A TITLE II BENEFICIARY AND AN ATTORNEY PROVIDES THE BASIS FOR DETERMINING THE AMOUNT OF A COUNSEL FEE, THAT CONTRACT-BASED FEE SHOULD ORDINARILY BE APPROVED IF THE COURT CONCLUDES THAT THE FEE IS REASONABLE AND DOES NOT EXCEED 25 PERCENT OF THE PAST-DUE BENEFITS AWARDED

For more than a century courts have supervised the terms of contingent fee contracts, refusing to enforce those agreements to the extent that "the compensation is clearly excessive." *Taylor v. Bemiss*, 110 U.S. 42, 45 (1884). That supervisory power is well established in the state courts, which have generally characterized the controlling question as whether a contract-based fee is "reasonable." These decisions recognize that in any given case there is a range of fees which would be reasonable,[12] and

[12] A member of this Court so observed during the oral argument in *Venegas v. Mitchell*, 495 U.S. 82 (1990). Transcript of

uphold the contract-based amount so long as it is within that range. There has, however, been significant uncertainty as to whether federal courts, in the absence of some express statutory authorization, have a comparable power to review the reasonableness of contingent fee agreements entered into by federal litigants. *See Venegas v. Mitchell*, 495 U.S. 82, 90 (1990).[13]

A distinct question has arisen under more recently adopted federal fee-shifting statutes, which typically authorize the award of a "reasonable" counsel fee to the prevailing party. Because in these cases there is between the prevailing and losing party no contractual agreement governing the size of counsel fees, the court itself must calculate the specific fee to be awarded, rather than merely identifying the range of fees that would be reasonable. This Court has developed a detailed set of legal standards to be applied by the lower courts in making these calculations. *E.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In 1965 Congress adopted section 406(b), which authorizes a court in cases under Title II of the Social Security Act to "determine and allow . . . a reasonable fee for . . . representation, not in excess of 25 percent of the total of the past-due benefits." 42 U.S.C. § 406(b). The central question presented by this case is whether section

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Oral Argument, No. 88-1725, 17 ("there's a vast range of reasonableness").

[13] During the oral argument in *Venegas* members of this Court raised questions about whether federal courts have any such inherent authority. Transcript of Oral Argument, No. 88-1725, 6, 7, 9, 10.

406(b) merely directs federal judges to engage in the traditional review of the reasonableness of a contingent fee agreement, or whether the statute requires federal judges to disregard any such agreement and instead make the sort of de novo determination of fee amounts that has occurred under fee-shifting statutes.

A. Section 406(b) Authorizes Contract-Based Fees As Long As They Are Reasonable

(1) This Interpretation Is Consistent With The Text and History of Section 406(b)

The meaning of section 406(b) can best be understood by reading the terms of the statute in the legal context in which it was enacted. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 528-33 (1994).

Shortly after the adoption of Title II,[14] Congress apparently became aware that applicants for benefits under that program were agreeing to large contingent-fee agreements with attorneys representing them before the Social Security Administration. In 1939 Congress authorized the Administration to "by rule and regulation, prescribe the maximum fees which may be charged" for representation before the agency, and provided that "any agreement in violation of such rules and regulations shall be void." 53 Stat. 1360, 1372. The fees that could be charged for representation in court, however, remained uncontrolled for several decades.

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[14] Title II was first enacted in 1935. *See* http://www.ssa.gov/history/35actinx.html.

By 1965, however, Congress concluded that those fees too should be restricted. It was at that time common for attorneys to negotiate contingent fee agreements under which Title II beneficiaries agreed to pay a fee equal to one-third to one-half of the back award recovered. *E.g., Hopkins v. Cohen*, 390 U.S. 530, 537 (1968) (White, J., dissenting) (pre-section 406(b) agreement for fee of 40%).[15]

The federal courts generally believed that they had no authority to limit such excessive contingent fees, or to resolve fee disputes that arose because of the absence of an express contract between a Title II beneficiary and his or her attorney.

> One view was that courts had no jurisdiction to set a fee for in-court representation and that attorney and client were free to contract as in the case of other litigation. . . . This view sanctioned the contingent-fee arrangements that were (and are) the dominant mode of contract between attorneys and Social Security claimants, and that often provided for fees as high as 50% of accumulated benefits. . . . Another view was that courts had inherent authority to award attorneys fees for work performed before

[15] *E.g., Gardner v. Mitchell*, 391 F.2d 582, 483 (5th Cir. 1968) (50%); *Hopkins v. Gardner*, 374 F.2d 726, 728 (7th Cir. 1967) (40%-50%); *Robinson v. Gardner*, 374 F.2d 949, 951 (4th Cir. 1967) (50%); *Lambert v. Celebrezze*, 361 F.2d 677, 679 (4th Cir. 1966) (50%); *In re Crouse*, 273 F. Supp. 642, 643 (S.D.W.Va. 1965) (50%); *Blankenship v. Gardner*, 256 F. Supp. 405, 409 (W.D.Va. 1966) (50%); *Castille v. Secretary of Health, Educ. and Welfare*, 238 F. Supp. 340, 341 (W.D.La. 1965) (50%); *Sheppard v. Flemming*, 189 F. Supp. 571, 517 (S.D.W.Va. 1960) (40%).

> them. . . . [I]t appears that under either view, a contingent-fee agreement would be honored by the courts. . . .

Webb v. Richardson, 472 F.2d 529, 533 (6th Cir. 1972).[16]

Section 406(b) was enacted to limit the contingent fees which Congress concluded were excessive.

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

S. Rep. No. 404, 89th Cong., 1st Sess., Pt.1, 122 (1965).[17] The Commissioner correctly explains that "Congress

[16] *See Gonzalez v. Hobby*, 213 F.2d 68, 69 (1st Cir. 1954) (declining to decide on merits motion by beneficiary for judicial determination of fee owed attorney); *Castille v. Secretary of Health, Educ. and Welfare*, 238 F. Supp. 340, 341 (W.D.La. 1965) ("the court will not undertake to regulate or fix the fee. This has been done by the parties themselves"); *Carroll v. Celebrezze*, 228 F. Supp. 24, 24 (N.D.Iowa 1964) (declining to rule on merits of request of counsel to "approve" proposed 33% fee on ground that the court could find no "authority to determine the attorney's fee. . . . It is the court's view that determination of the fee is a matter of agreement between the attorney and his client").

[17] The explanation accompanying the original proposal from the Department of Health, Education, and Welfare for

adopted the fee provision of section 406(b) to prevent abusive fee practices of lawyers in social security cases." (Br. Resp't Opp'n 13.) That congressional purpose is fully satisfied when the court concludes that the fee requested is not "abusive"; nothing in the language or the legislative history of section 406(b) contemplates that the court should go further and select from within the range of non-abusive fees the amount which the judge thinks most appropriate.

The statutory authority to allow a "reasonable" fee was consistent with the traditional role of the courts in supervising counsel fees, a role which carefully distinguished between cases in which the attorney and client had agreed on a fee, and those in which they had not. Where there is a contingent fee agreement, courts will inquire only whether the agreed upon fee is reasonable; if, however, the attorney and client never reached a meeting of the minds regarding the amount of a fee (or a method of calculating the fee), the court itself will set the fee.[18]

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what was to become section 406(b) described in similar terms the problem of "inordinately large fees," and explained that under the language adopted by Congress "claimants would be . . . protected from being charged exorbitant fees." Hearings on H.R. 6675 Before the Senate Finance Committee, 89th Cong., 1st Sess., 513 (1965).

[18] "[T]here is a distinction between the question of the reasonableness of the fee set by a contract between an attorney and his or her client, and the question of the reasonable value of an attorney's services in the absence of an express agreement fixing the amount of his or her compensation. In the absence of an express agreement as to the amount of the attorney's fee, the court or jury must decide on a specific amount within what

Where, as in the case of a contingent fee agreement, the attorney and client agreed upon a fee (or a basis for calculating a fee), state courts traditionally[19] exercised responsibility – which federal courts prior to 1965 doubted they possessed in Title II cases – to ascertain whether the amount of the agreed upon fee was reasonable. The standard for determining whether a contingent fee agreement was enforceable was reasonableness. S. Speiser, Attorneys' Fees (1973), § 2:10, 92-96; 46 Am. Jur. Proof of Facts (Second), 13-31 (collecting cases).

> The percentage of the recovery that the attorney can claim is subject to close scrutiny and is perhaps the most closely monitored aspect of contingent fee contracts. . . . Just because . . . the attorney may receive compensation greater than that otherwise recoverable but for the contingency, a fee will not be deemed unreasonable. . . . [T]he reasonableness depends on the circumstances of the case.

Attorney-Client Fee Arrangements: Regulation and Review, A Report to the Federal Judicial Center, 90-92

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would ordinarily be a range of reasonable fees. In contrast, a finding as to the reasonableness of the fee set pursuant to a contract requires a determination of the upper limit of that range. Thus, judicial decisions as to a reasonable fee in the absence of a contract may be distinguishable from decisions as to the reasonableness of the fee set by a contract." 46 Am. Jur. Proof of Facts (Second) 1, 8 (footnotes omitted).

[19] *E.g., Gair v. Peck*, 6 N.Y. 2d 97, 160 N.E. 2d 43, 49 (1959) ("In the decisions on this subject, of which there are many, it is recognized throughout that there comes a point where the amounts to be received by attorneys under contingent fee contracts are large enough to be unenforcible [sic]").

(1980) (footnotes omitted). The requirement of reasonableness dates at least from the 1908 Canons of Professional Ethics.[20]

Section 406(b) must be interpreted in light of the traditional supervisory role – important but limited – which courts have exercised with regard to assessing the reasonableness of contingent fee agreements. Absent plain language to the contrary, Congress can fairly be assumed to have intended that federal courts only exercise the traditional responsibility for assuring that a contingent fee is not unreasonable in amount.[21] Because Title II claimants will not have separate counsel who might raise any objection to the fee agreement, Congress placed

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[20] Canon 13 provided:

> "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."

Currently DR 2-106(b) states that

> "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

DR 2-106 includes a list of factors to be used "in determining the reasonableness of a fee", including "[w]hether the fee is fixed or contingent."

[21] The requirement that fees below the cap be found reasonable contrasts with the terms of the International Claims Settlement Act of 1949, which provided with regard to fees below the statutory ceiling (there 10%) that "[w]ritten evidence that the claimant and any . . . attorney have agreed to the amount of the attorney's fees shall be conclusive upon the Commission." 64 Stat. 12, 15.

on the federal courts an affirmative obligation to scrutinize the fee and assure that it is reasonable.[22] That interpretation is entirely consistent with the legislative history of the statute, which evidences a concern to provide the courts with the authority needed to prevent attorneys from collecting fees that are "inordinately large." That statutory purpose is fully satisfied when a court concludes that the fee sought is below the level that would be excessive. Nothing in the text or legislative history of the statute suggests it was the intent of Congress to authorize judges to select from within the range of fees that are *not* "inordinately large" the particular fee that a given judge might think most reasonable.

The language of section 406(b) stands in sharp contrast to other legislation in which Congress had expressly done precisely that, flatly invalidating any fee agreement between the attorney and client and directing the courts to decide de novo what the fee should be. For example, in authorizing the Court of Claims to hear certain claims related to conflicts with Native Americans, Congress provided that

> all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void . . . and the allowances to the

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[22] Several years earlier New York courts adopted a somewhat more complicated scheme, declaring that contingent fees above certain specified levels were "unreasonable compensation" in violation of the Canons of Ethics unless a court had concluded that that higher level was "reasonable compensation." *See Gair v. Peck*, 6 N.Y. 2d 97, 160 N.E. 2d 43, 45-46 n.1 (1959).

> claimant's attorneys shall be regulated and fixed by the court . . . .

26 Stat. 851-54 (1891). Congress used similar language in the Alaska Native Claims Settlement Act of 1971:

> None of the revenues granted by [the Claims Act] shall be subject to any contract which is based on a percentage fee of the value of all or some portion of the settlement granted by this [Act].

43 U.S.C. § 1621(a). By contrast, the terms of section 406(b) do not purport to invalidate fee agreements per se, or to declare them void insofar as they purport to resolve within the range of reasonable fees what fee shall be paid.

The Commissioner contends that Congress envisioned that there would in any given case be only one fee that was reasonable, and directed federal judges to ascertain what that fee was.

> Section 406(b) does not say . . . that counsel will get 25% of the award unless that amount is inequitable and unreasonable. Rather it says that the court will determine *the* "reasonable fee" to be awarded.

(Br. Resp't. Opp'n 13 (emphasis added).) The actual terms of the statute, however, refer to determination of "*a* reasonable fee" (emphasis added) not of "the 'reasonable fee.' " The difference between the articles "the" and "a" is of considerable importance, because it in turn alters the meaning of "determine."[23] The phrase "determine *the*

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[23] The word determine has a number of distinct meanings including "[t]o decide . . . conclusively and authoritatively" and "[t]o . . . ascertain definitely, as after consideration, investigation, or calculation." The American Heritage Dictionary of the English Language, (1969), 359.

reasonable fee" suggests that there is one particular fee that is reasonable, and that the court is to detect what it is. (As in, "the taxi driver will determine the shortest route to DuPont Circle.") On the other hand, the phrase "determine *a* reasonable fee" means only that the court will definitively resolve what the fee is, and that the fee chosen must be reasonable; it does not purport to indicate how the court is to make the choice among the range of fees that would be reasonable. (As in, "the coach will determine which senior will be the team captain.")

A number of lower courts have suggested that Congress would have wanted to preclude any consideration of percentage-based contingent fee agreements because, in their view, the amount recovered in a Title II case is necessarily unrelated to the amount or quality of work done by the attorney. In fact, however, more effective representation can result in a larger award.[24] More importantly, section 406(a)(2) expressly authorizes awards based on contingent fees for legal representation in the administrative process. Under section 406(a)(2), subject to certain exceptions, an attorney will be awarded a fee

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[24] A skilled attorney may increase the amount of benefits by persuading the court to reopen an earlier claim, *e.g.*, *Gonzales v. Sullivan*, 914 F.2d 1197, 1202-03 (9th Cir. 1990); *McGuire v. Sullivan*, 873 F.2d 974, 982 (7th Cir. 1989), to accept an earlier date of onset of disability, e.g., *Vertigan v. Halter*, 260 F.3d 1044, 1054 (9th Cir. 2001), or, as in *Gisbrecht*, by convincing the court that the period of disability lasted longer.

equal to 25% of back benefits, up to a ceiling of $4,000[25], based on "an agreement between the claimant and [the attorney]." Approximately 88% of all fee claims for work in the administrative process are resolved under section 406(a)(2),[26] and the number of claims litigated in that process is far larger than those which reach court. It is difficult to believe that Congress, having expressly approved contingent-fee based awards for work in the administrative process, meant tacitly to bar awards on that very basis for legal work in court.

This argument, moreover, disregards the central congressional purpose in enacting section 406(b). Congress was not primarily concerned with whether the fee awarded was an accurate reflection of the time and skill of the attorney. Had that been its purpose, Congress assuredly would not have imposed a 25% ceiling on fee awards; as this Court has recognized, the fair value of an attorney's work may well exceed the total amount recovered. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561 (1986). Rather, Congress was animated by a desire to assure that claimants retain a large portion of their

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[25] The ceiling can be increased under section 406(a)(2)(iii). In 2002 the ceiling will be raised to $5,300. *See* http://www.ssa.gov/representation/raisethemax.html.

[26] Social Security's Processing of Attorney Fees: Hearing Before the Subcommittee on Social Security of the House Committee on Ways and Means, 107th Cong., 1st Sess., 9 (2001) ("In 2000, the fees of about 88 percent of all cases involving representation were approved using the fee agreement process") (statement of William C. Taylor, Deputy Assoc. Comm'r, Office of Hearings and Appeals, Social Security Administration).

accrued back benefits. Congress' conclusion that contingent fees of one-third to one-half were "inordinately large" was necessarily based only on the portion of the award left to the claimant; Congress did not purport to have any information or concern regarding whether the resulting fees exceeded the hours expended multiplied by an appropriate hourly rate. A fee agreement which guarantees the claimant that he or she will actually receive 75% of those benefits is manifestly more consistent with that purpose than an agreement which requires the claimant to pay a reasonable hourly rate for time expended regardless of the size of the resulting fee.

The Commissioner objects that if the choice among reasonable fees could be based on the terms of a contingent fee contract, then lawyers could receive different fees despite having provided the same services. (Br. Resp't Opp'n 15-16.)[27] But such a disparity is precisely the result mandated by the express provisions in section 406(a)(2). The uniformity contemplated by section 406(a)(2) is in the proportion of back benefits that is guaranteed to claimants, not in the hourly rates paid to their attorneys.[28]

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[27] Similar disparities would in any event result even under the Commissioner's view of the law, since in some but not all cases attorneys would receive less than the lodestar calculation because of the 25% limitation.

[28] The lodestar method, moreover, does not in practice result in identical awards under similar facts. The application of the multi-faceted lodestar calculation involves a considerable degree of judicial discretion. In *Miller*, for example, Judge Frye awarded Ralph Wilborn only $150 an hour, despite the fact that several other judges in the same district had earlier awarded the

The general language of section 406(b) should be construed in a manner congruent with the more detailed provisions of section 406(a)(2). Section 406(a)(2) controls the amount of the fees awarded in the overwhelming majority of administrative cases. Under section 406(a)(2) a fee will be awarded under the terms of a contingent fee contract (up to 25%, but no more than $4,000) unless the resulting fee would be "clearly excessive for the services rendered" or the attorney failed "to adequately represent the claimant's interest." 42 U.S.C. § 406(a)(3). It would be strange indeed if the contract-based fee awards that are mandatory under section 406(a)(2) were deemed to be impermissible under section 406(b), particularly since those fees might be sought under the same contract for presenting essentially similar arguments.

Such a distinction between the standards under section 406(a)(2) and 406(b) would have a singularly perverse result. If the court in a Title II case concludes the agency has erred, it may either direct the award of benefits or remand the case for further proceedings. A judicial award is a far more favorable outcome for the beneficiary, since it assures the claimant will get benefits (claimants lose about 40% of remands) and avoids the delay of further administrative proceedings. But an attorney who succeeds in winning an outright judicial award may as a consequence receive a substantially smaller legal fee. In the Commissioner's view such a lawyer's section 406(b) fee would be based solely on a lodestar calculation. If,

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same attorney $175 and $200 per hour. (Pet'r App. 24-26; Pl.'s Reply to Def.'s Resp. to Pl.'s Motion for Approval of Attorney's Fees, *Miller*, No. CV-96-6164-AS, Record 55.)

however, the attorney was less successful and the case was only won after a remand, the attorney – in addition to the section 406(b) lodestar based fee – would almost invariably be awarded another contract-based $4,000 fee under section 406(a)(2).[29]

That peculiar result is starkly illustrated by the circumstances of this case. Among cases such as this which are litigated in court, only 6% result in a judicial award of benefits, compared to remands in about 48% of cases.[30] Despite those odds, the attorneys in this case succeeded in winning judicial awards for all three of the claimants. Had the attorneys been less successful, won benefits only after remand, and had fee agreements under 406(a)(2), they would under section 406(a)(2) have received an additional $10,000[31] from their clients. Because, however,

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[29] Although the attorney would only be entitled to a section 406(a)(2) award if he or she also provided legal representation on remand, the award under section 406(a)(2) is not generally based on the amount of legal work done. The full $4,000 award would not be available for work done on remand if an award were also made for work done prior to the court action.

[30] Social Security Advisory Board, Disability Decision Making" Data and Materials (2001), 85, *available* at http://www.ssab.gov/chartbookB.pdf.

[31] In *Gisbrecht* Petitioners' attorney Ralph Wilborn was authorized to collect $2,000 as a section 406(a) fee for work done at the Appeals Council prior to the civil litigation. This authorization would reduce the additional amount the Petitioners' attorneys could have received under section 406(a)(2) if the case had been remanded. If the court had not awarded benefits to Gisbrecht, the attorney would not have sought a section 406(a) fee from the Appeals Council.

no remand was ordered, the total fees paid by the clients under section 406(b) was only $296.75.

(2) *Hensley v. Eckerhart*, 461 U.S. 424 (1983) Does Not Require A Different Interpretation

In the first fifteen years after the adoption of section 406(b), contingent-fee contract-based awards appear to have been the rule. Awards equal to 25% of back benefits were made in approximately half of the reported cases.[32] *E.g.*, *Marion v. Gardner*, 359 F.2d 175, 181 (8th Cir. 1966) (opinion by Blackmun, J.). The leading appellate decision of this era expressly approved contract-based awards so long as the court concluded the fee requested was reasonable. *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967) ("the court . . . may approve a fee in accordance

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[32] *McCalip v. Richardson*, 460 F.2d 1124, 1130 (8th Cir. 1972) (opinion joined by Justice Clark); *Mitchell v. Weinberger*, 404 F. Supp. 1213, 1219 (D. Kan. 1975); *Rufer v. Richardson*, 345 F. Supp. 583, 585 (D.S.D. 1972); *Hopkins v. Gardner*, 374 F.2d 726 (7th Cir. 1967); *Philley v. Cohen*, 293 F. Supp. 1068, 1072 (N.D.Miss. 1968); *Robles v. Gardner*, 287 F. Supp. 200, 207 (D.P.R. 1968); *Wilson v. Gardner*, 282 F. Supp. 287, 290 (S.D.Ohio 1967); *Gray v. Celebrezze*, 245 F. Supp. 718, 722 (W.D.Va. 1965).

Smaller awards were made in *Edgens v. Richardson*, 455 F.2d 508, 508 (4th Cir. 1972) (16.0%); *Conner v. Gardner*, 381 F.2d 497, 500 (4th Cir. 1967) (20%); *Celebrezze v. Sparks*, 342 F.2d 286, 286 (5th Cir. 1965) (20%); *Burgo v. Harris*, 527 F. Supp. 1157 (E.D.N.Y. 1981) (8.2%); *Little v. Califano*, 462 F. Supp. 575 (W.D.N.C. 1978) (attorney requested 13.3%; court awarded 16.5%); *McDaniel v. Cohen*, 288 F. Supp. 808, 813 (W.D.Va. 1968) (20%); *Pollard v. Gardner*, 267 F. Supp. 890, 909 (W.D.Mo. 1967) (fee limited to 25% of benefits due as of date of court's opinion).

with a contingent fee contract within the statutory maximum if it finds, under all of the circumstances, that the fee is reasonable"). Since 1983, however, a number of circuits have held that fees under section 406(b) must instead be calculated by means of the lodestar methodology used under fee-shifting statutes, believing that contract-based fee determinations are precluded by this Court's decision in *Hensley*, 461 U.S. 424.[33]

But the calculation of the appropriate fee under a fee-shifting statute is entirely distinct from a determination of the reasonableness of a fee agreement.

> [T]here is a difference . . . between the court's role in awarding a fee under [a fee-shifting statute] and in exercising its supervisory power over the bar. . . . The first requires the court to arrive at a figure it considers reasonable; the second requires it to arrive at a figure which it considers the outer limit of reasonableness.

Farmington Dowell Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 90 (1st Cir. 1969).[34]

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[33] *See, e.g., Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989) ("our opinions written before 1983 on the subject of fee allowances for attorneys representing social security claimants should now be read in light of the rules discussed in *Hensley* and *Blum [v. Stenson*, 465 U.S. 886 (1989)]").

[34] *See also Cooper v. Singer*, 719 F.2d 1496, 1504 n.13 (10th Cir. 1983) (en banc) ("in describing a fee as 'reasonable,' the meaning changes as the context shifts. When a court calculates a 'reasonable fee,' it determines a specific figure that represents the court's best approximation of the value of the lawyer's services. When a court reviews the reasonableness of a fee . . . reached by voluntary agreement, it determines whether

Neither *Hensley* nor this Court's subsequent decisions involving fee-shifting statutes bar, or even purport to consider, contract-based fee awards, under section 406(b) or otherwise. *Hensley* and its progeny necessarily announce a detailed method for calculating a specific counsel fee because under a fee-*shifting* statute there will rarely be between the prevailing party's counsel and the losing party any pre-suit contingent fee or other agreement regarding the amount of any counsel fee. Nothing in this Court's decisions, however, suggests that such an agreement, if it existed, would be unenforceable, or that a court would insist upon making and imposing its own lodestar calculation even if the parties and counsel had stipulated in advance to some other figure or methodology. To the contrary, *Hensley* insisted that "[i]deally, of course, litigants will settle the amount of a fee." 461 U.S. at 436. Such a settlement could assuredly be reached before the merits themselves were resolved.

Under *Hensley*, if the parties and counsel stipulated at the outset (or at the end) of the litigation that the defendant, if it lost, would pay a counsel fee of 25%, a

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the fee falls within a range that is neither excessive nor inadequate."); *International Travel v. Western Airlines*, 623 F.2d 1255, 1277 (8th Cir. 1980) ("The role of the court in awarding a reasonable fee under [a fee-shifting statute], and in exercising its supervisory power over the bar by examining contingency agreements between attorney and client, differs greatly"). In *International Travel* the court using a lodestar method awarded $43,089.75 in fees against the defendant; in limiting the amount of the contingent fee which the successful plaintiff was to pay its attorney, the court held that "the outer bounds of reasonableness" was 45% of the treble damage award, $167,718.20. *Id.* at 1276, 1278.

court – at least in the absence of a showing of unconscionability – would enforce that agreement rather than make its own lodestar calculation. Indeed, even in a Title II case the Commissioner does not assert that *she* cannot resolve a fee dispute by settlement. If in the instant litigation the Commissioner had agreed in the spring of 1996 that the fee in these cases (if successful) would be 25% minus any EAJA awards, that would presumably have been accepted by the court. The Commissioner insists, however, that unlike agreements made by any party under a fee-shifting statute, or by the Social Security Administration in a Title II case, agreements made by Title II claimants must be disregarded in their entirety. Nothing in the language of section 406(b) requires such an aberrational result; rather, agreements by Title II claimants may also be implemented by the courts if they conclude that the terms of those agreements are reasonable.

It is, moreover, decidedly anachronistic to insist that a 1965 statute enacted to supervise attorney-client fee arrangements must be governed by this Court's 1983 decision in *Hensley* regarding fee-shifting statutes. Rather, section 406(b) should be construed in light of the similarly phrased provisions of 38 U.S.C. § 1984(g) regarding agreements for fees paid to attorneys who represent successful claimants under the National Service Life Insurance program. Section 1984(g) directs the court to "determine and allow reasonable fees for the attorneys", subject to a cap of 10%. In the years prior to the 1965 enactment of section 406(b), fee awards by courts under section 1984(g) were invariably stated as a percentage of

the insurance award, rather than as a specific dollar amount calculated by any lodestar-like method.[35]

In the context of a section 406(b) fee request, utilization of the lodestar approach effectively substitutes the discretion of the district judge for the agreement of attorney and client. The lodestar methodology does not mandate a single, specific, legally correct fee in a given set of circumstances. Rather, the rates, hours and possible enhancements are all matters of district court discretion. The district judge can in practice select any fee that lies

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[35] *Moss v. United States*, 311 F.2d 462, 463 (2d Cir. 1962) (6%); *United States v. Donaldson*, 246 F.2d 148, 151 (9th Cir. 1957) (10%); *United States v. Myers*, 213 F.2d 223, 226 (8th Cir. 1954) (10%); *United States v. Hendrickson*, 53 F.2d 797 (10th Cir. 1931) (10%); *Mortek v. United States*, 297 F. 485, 490 (E.D.Ill. 1924) (5%); *McGovern v. United States*, 294 F. 108, 111 (D.Mont. 1923) (5%); *Phillips v. United States*, 238 F. Supp. 59, 62 (S.D.Ala. 1965) (10%); *Morris v. United States*, 271 F. Supp. 220, 231 (N.D.Tex. 1963) (10%); *Coleman v. United States*, 209 F. Supp. 432, 433 (E.D.La. 1962) (10%); *Friedman v. United States*, 186 F. Supp. 139, 146 (W.D.Ark. 1960) (10%); *Banks v. United States*, 170 F. Supp. 534, 535-36 (D.Conn. 1958) (10%); *United States v. Smith*, 159 F. Supp. 741, 746-47 (S.D.N.Y. 1958) (10%); *Swart v. United States*, 158 F. Supp. 874, 877 (W.D.Va. 1958) (10%); *Liles v. United States*, 153 F. Supp. 54, 57 (E.D.N.C. 1957) (10%); *Dean v. United States*, 150 F. Supp. 541, 545 (W.D.Okl. 1957) (10%); *Hassey v. United States*, 140 F. Supp. 1, 4 (M.D.Ala. 1956) (10%); *White v. United States*, 123 F. Supp. 869, 871 (W.D.Va. 1954) (10%); *Moran v. United States Veterans' Admin.*, 115 F. Supp. 640, 642 (E.D.Mich. 1953) (10%); *Griffin v. United States*, 115 F. Supp. 509, 519 (W.D.Ark. 1953) (10%); *Burk v. United States*, 85 F. Supp. 93 (D.Pa. 1948) (10%); *Cotter v. United States*, 78 F. Supp. 495, 503 (D.Md. 1948) (8%); *Vaughn v. United States*, 78 F. Supp. 494 (D.Tenn. 1947) (10%); *Sloan v. United States*, 19 F. Supp. 777 (D.S.C. 1937) (10%); *Moragne v. United States*, 16 F. Supp. 1008 (D.S.C. 1936) (10%).

within the range of fees bounded by the fees so high or so low that their selection would be an abuse of discretion.[36] The range of fees among which the district court may choose resembles the range of reasonable fees among which the attorney and client would ordinarily be permitted to select. Once the possibility of an unreasonable, inordinately large fee has been eliminated, transferring that choice from the attorney and client to the judge does nothing to advance the avowed purpose of section 406(b), and imposes serious transactional costs.

B. The Lodestar Method Of Calculating Fees Is Inappropriate In Section 406(b) Cases

The lodestar methodology has been fashioned by this Court to implement the purpose of fee-shifting statutes, and has been framed in light of the circumstances typical of litigation under those laws. Both the purpose of section 406(b) and the circumstances of Title II litigation are in important respects quite different from those of fee-shifting statutes. Application of the traditional lodestar method in these circumstances would lead to a number of incongruous results.

The overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants. If the reasonableness requirement is construed in that light, contract-based fee awards can be scrutinized in a limited manner faithful to the intent of

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[36] *See* Pet'r App. 26 (fee recommended by magistrate judge "was within legal boundaries").

Congress. A mechanical application of the lodestar calculation, on the other hand, would lead to results Congress is unlikely to have intended. In comparison to the traditional judicial scrutiny of the reasonableness of a contingent fee award, the lodestar calculation, while considerably more intrusive, is in several important respects decidedly less flexible.

First, a court in applying the reasonableness limitation under section 406(b) could take into consideration the amount of counsel fees that the claimant was also paying to the attorney under section 406(a) for representation in the administrative process. The 25% cap in section 406(b) applies only to awards for in-court litigation. Fees for administrative representation are subject to a separate 25% cap if sought under section 406(a)(2), and to no cap at all if obtained under section 406(a)(1).[37] Nothing in the lodestar methodology would permit a court, in calculating section 406(b) fees, to consider the existence of a section 406(a) award; the purpose of lodestar calculations is simply to calculate a fair fee for the attorney.

Second, if, as the Commissioner contends, section 406(b) awards are to be calculated using only the traditional lodestar methodology, without regard to any agreement between attorney and client regarding the amount of the fee, that would have to be the case regardless of which party was favored by the fee agreement. On this view, for example, an attorney who promised to charge only $50 an hour, or to seek a fee of less than $500, or to

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[37] Thomas E. Bush, Social Security Disability Practice (2d ed. 2001), v. 2, section 755.

represent the claimant for free, would be entitled (as would a claimant) to disregard that agreement and ask for a substantial lodestar-based fee.[38]

Third, a mechanical application of the lodestar methodology will often mean, as occurred in the instant case, that the claimant will not pay any legal fee at all, a result that simply could not occur in the fee-shifting context. In a substantial number of cases, as here, claimants' attorneys win not only an award of benefits, but also an award of counsel fees under the EAJA. 28 U.S.C. § 2412(d).[39] EAJA awards are paid by the United States, and they reduce dollar-for-dollar the fee the claimant must pay to his or her attorney. 99 Stat. 186. Where, as occurred here, the 406(b) fee is calculated using the lodestar method, and the resulting calculation is lower than the EAJA award, the client pays no fee at all.[40] The avowed purpose of section 406(b) was to protect claimants from having to pay "inordinately large" counsel fees. That purpose manifestly is not served by the outcome in this case, under which claimants who had won more than $114,000 paid a total fee of less than $300. Yet that

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[38] *See McDonald v. Weinberger*, 512 F.2d 144 (9th Cir. 1975) (enforcing contract limiting fee to amount below the statutory maximum).

[39] The hourly rate for EAJA fees is to some degree regulated by statute. 28 U.S.C. section 2412(d)(2)(A); *Pierce v. Underwood*, 487 U.S. 552 (1988).

[40] That result has occurred in a number of other cases. *See, e.g., Rosser v. Chater*, No. CIV 94-CV-5620, 1999 WL 144106 (E.D.Pa. Mar. 15, 1999); *Ott v. Apfel*, 994 F. Supp. 1318 (D.Kan. 1998); *Hall v. Callahan*, No. 96 C 580, 1998 WL 142403 (N.D.Ill. Mar. 24, 1998).

implausible result is mandated by a mechanical application of the lodestar methodology. On the other hand, a court making the narrower but more flexible determination of whether a fee was unreasonable could and would consider how much the client was actually being asked to pay.

The factual predicate on which lodestar calculations are typically based – the existence of an hourly market rate for the type of legal work involved – is absent in a Title II case. The prevailing market rate for an attorney's work is not simply a function of the number of years he or she has practiced. Different prevailing rates will often exist in different fields. Attorneys with a high degree of specialized experience will often make more than general practitioners, but the difference will likely depend on the specialty. No such market assessments, however, are possible for lawyers who specialize in Title II cases. Section 406(b) expressly prohibits attorneys from ever charging clients non-contingent fees for handling such cases. Attorneys often base their hourly rate requests on the rates which they charge their fee-paying clients. *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984). But a lawyer who only litigates Title II cases will have no such fee-for-service clients.

Because of the unique nature of Social Security cases and litigation, utilization of the lodestar method has had the effect of limiting the types and quality of representation available to claimants. Regardless of the methodology used, the fee award in any single Title II case is typically modest. These cases are usually resolved on

summary judgment; one survey concluded that the average case involved fewer than 40 hours of legal work.[41] Thus an attorney can only derive a meaningful income from Title II cases by handling a steady stream of such litigation. It is clear, however, that most of these cases will be unsuccessful; on average claimants who go to court ultimately prevail about 35% of the time.[42]

Courts attempting to apply the lodestar methodology to Title II cases have fixed an hourly rate based on the prevailing rate for lawyers with a given level of general experience. In this case, for example, the district court concluded in *Sandine* that the median hourly rate in the Portland area for attorneys with four to six years of experience was approximately $125. (Pet'r App. 38.) In order for an attorney handling Social Security cases to actually *earn* an average of $125 an hour, however, the lawyer would have to win all of the numerous cases he or she handled, a virtually impossible task. Although a skilled attorney with substantial experience in Social Security cases will have some ability to pick the stronger

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[41] *Rodriquez v. Bowen*, 865 F.2d 739, 747 n. 4 (6th Cir. 1989); *see also Patterson v. Apfel*, 99 F. Supp.2d 1212, 1214 n. 2 (C.D.Cal. 2000) (collecting cases describing range of hours). The total number of hours claimed here was 25.08 in *Gisbrecht*, 39.91 in *Miller*, and 52.40 in *Sandine*. (Pet'r App. 19, 27, 33.)

[42] Claimants win judicial awards in 6% of cases, and remands in about 48%. Recently an average 60% of all remands ultimately resulted in awards. Disability Decision Making: Data and Materials (Jan. 2001), 85. The proportion of claimants who have been successful on remand has usually been lower. *Wells v. Bowen*, 855 F.2d 37, 45 n.1 (2d Cir. 1988) (*Wells I*).

cases, sure winners will not often be obvious; if the meritoriousness of a case were patently apparent, it would be unlikely that both the ALJ and the Appeals Council would have rejected that claim. An attorney talented enough to win 80% of his or her cases would actually earn on average only $100 per hour. In reality even the experienced Social Security lawyers best able to identify meritorious cases cannot actually earn the hourly rate paid to comparable attorneys with fee-for-service clients.

The prospects for claimants with merely average cases, those with a 35% chance of success, are not encouraging. An attorney who takes these cases, and wins 35% of the time, will actually make an average hourly rate equal to only 35% of the median for lawyers of his or her experience. If the court awards fees, as in *Sandine*, using a median of $125 per hour, these lawyers will earn on average only $44 an hour.[43] Lawyers who are actually able to make the median $125 an hour from paying clients simply will not take such cases. Rather, a type of case which yields only $44 an hour will attract only lawyers who are otherwise making only that lower sum, or who are struggling to find any clients at all. Although there will, of course, be exceptions, lawyers making far less than their peers will often be less able.

Because of the modest size of the fee claim in any single Title II case, the transactional cost of litigating a

[43] *See* Richard A. Posner, *Economic Analysis of Law*, section 21.9 (5th ed. 1998) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed").

disputed lodestar-based claim will at times be prohibitive. The typical Title II case involves only about forty hours of work on the merits; most section 406(b) claims or awards are under $10,000. In *Hensley*, by comparison, the plaintiffs' attorneys had expended 2,557 hours and obtained a fee in excess of $130,000. 461 U.S. at 430, 436. In Title II cases the time and opportunity cost of litigating a lodestar-based claim will often be substantial in comparison to the underlying fee claim itself. Lodestar calculations involve an array of factual issues. At least where the fees are disputed, the moving party may be required to offer affidavits, fee surveys, or other evidence or experts on any of these questions. The same issue may have to be relitigated repeatedly. For example, although federal courts on at least twenty-one prior occasions had awarded attorney Ralph Wilborn $175 or $200 per hour, the Commissioner in *Miller* insisted on litigating the issue yet again, and persuaded the district judge in that case to instead use an hourly rate of only $150.[44]

The amount of time and energy devoted to a lodestar dispute can easily equal those involved in the merits of the underlying litigation, as these cases well illustrate. The fee applications in these cases sought a combined fee (net after EAJA deductions) of $13,253.54, less than 12% of the benefits that had been awarded. In support of those applications Petitioners' counsel filed eight legal memoranda and a number of affidavits and exhibits; attorneys representing the Commissioner filed three additional

[44] Pet'r App. 24-26; Pl.'s Reply to Def's Resp. to Pl.'s Motion for Approval of Attorney's Fees, 6-7, *Miller*, No. CV-96-6184-AS, Record 55.

opposing memoranda. The district judges and magistrates judges wrote a total of five opinions disposing of the disputes. The fee motions were pending for an average of nine months.

Although in fee-shifting cases counsel fees are awarded for the time needed to present a fee claim, the lower courts have not awarded such fees in Title II cases.[45] Thus an attorney who devotes ten hours of work to presenting a section 406(b) claim for forty hours of work will lower his or her effective hourly rate by 20%; if twenty hours of work were required for the fee litigation, the effective hourly rate would fall by 33%. If the attorney has already won an EAJA award, and thus will get no section 406(b) award unless the lodestar calculation is higher than the EAJA award, the section 406(b) award may as a practical matter be denied, rendering the investment of time and expense litigating that claim a complete loss. In most circumstances it makes little economic sense for an attorney to appeal an adverse decision on a section 406(b) motion, however erroneous the decision may be.

These transactional costs have had several significant consequences for Social Security practitioners. *Cf. Jean v. Commissioner, INS*, 496 U.S. 154, 164 (1990) ("If the Government could impose the cost of fee litigation on prevailing parties by asserting a 'substantially justified' defense to fee applications, the financial deterrent that the EAJA aims to eliminate would be resurrected."). First, in the common situation in which a claim has been won on

[45] *See Coup v. Heckler*, 845 F.2d 313, 325 (3d Cir. 1987); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324 (4th Cir. 1989).

remand, and the attorney at least is receiving fees under section 406(a)(2), the attorney may not even ask for the section 406(b) fees to which he or she is entitled, at least where a below average number of hours is involved. Second, in cases in which there has been an EAJA award, attorneys may be deterred from seeking a section 406(b) award by the possibility that such a motion will yield no additional fee at all. Third, the willingness of practitioners to file section 406(b) motions depends in part on how frequently agency attorneys oppose such fee applications.

The courts of appeals that have approved contract-based fee determinations have done so in part to simplify the fee litigation process. The Sixth Circuit correctly observed in *Rodriquez*, 865 F.2d 739, that

> [t]he courts as well as the Social Security Administration are sometimes spending almost as much time reviewing and setting fees as they are in dealing with the merits of the benefits determination.

Id. at 746. The Second Circuit correctly concluded that basing approval of fee awards instead on the reasonableness of the request is preferable because

> [i]n each case where the contingent fee is found to be reasonable, based on a general assessment of the fee in relation to the nature of the litigation, the need for complicated calculations, expert evidence, and protracted litigation vanishes.

Wells v. Bowen, 907 F.2d 367, 372 (2d Cir. 1990) (*Wells II*).

C. The District Court In These Cases Did Not Apply The Correct Standards

Although section 406(b) permits an attorney to base a fee application on a contingent fee agreement with the claimant, the statute does not create any presumption in favor of the agreed upon amount. To the contrary, because section 406(b) requires an affirmative judicial finding that the fee allowed is "reasonable," the attorney bears the burden of persuasion that the statutory requirement has been satisfied.

The court to which such a fee application is made should affirmatively assess the specific considerations enumerated in section 406(a)(3): whether the fee requested is "clearly excessive" and whether the attorney has adequately represented the claimant's interest. Such matters often will already be within the knowledge of the judge who resolved the merits of the case. Determination of the upper limit of the range of reasonable fees should be a simpler and usually less contentious undertaking than making a lodestar calculation; there would, for example, be no occasion to litigate whether the appropriate hourly rate for a given attorney was $150 rather than $175. In addition, the court should consider whether delay by the attorney has in any way contributed to the size of the back award, and, if so, reduce the award accordingly. *Cf.* 28 U.S.C. § 2412(d)(1)(C). Any contingent fee agreement may fairly be construed not to envision that an attorney's own delays would increase the fee paid by the client.[46] The court may consider as well any other

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[46] *See Rodriquez*, 865 F.2d at 746-47.

matter that bears on the reasonableness of the fee requested.

In assessing the reasonableness of the amount of the fee request, the court should consider the total amount that the claimant is actually being asked to pay out of the back benefits. Thus if a fee award under section 406(a) has been made (or is foreseeable), especially to the same attorney, the court might well find unreasonable the payment of an additional fee equal to 25% of the original, but now diminished, award. Conversely, if because of an EAJA award the attorney is asking that the claimant pay a fee that will be substantially less than the 25% to which the claimant agreed, that circumstance will weigh in favor of a finding of reasonableness. Absent unusual circumstances (such as ineffective assistance), a court could not conclude that the largest fee that would be reasonable for the claimant to pay is no fee at all.

The decisions of the district court in this case did not purport to proceed in this manner. None of those decisions undertook to address the statutory issue of whether the fee requested was within the range of reasonableness. Rather, in each instance the district court – as required by Ninth Circuit precedent – made its own lodestar calculation of the proper amount. (Pet'r App. 19, 29, 35.) But the fact the fee requested was larger than the lodestar calculation does not of course mean that that fee was unreasonable within the meaning of section 406(b). On remand the Commissioner may choose to contend that the amount of one or more of the fees requested under section 406(b) was clearly excessive and thus unreasonable, but that manifestly was not the issue decided by the district court.

II. IN LODESTAR-BASED FEE CALCULATIONS UNDER SECTION 406(b) THE COURT SHOULD CONSIDER THE CONTINGENT RISK PRESENTED BY THE CASE

If this Court concludes that fee awards under section 406(b) must always be based on a judicial calculation of the fair market value of the legal representation, that calculation should be made in a manner consistent with what was in 1965 the established method of fixing such a fee in the absence of a controlling contractual agreement.

Where a client has a contractual obligation to pay a legal fee, but the client and attorney have not agreed on the amount of the fee (or the method of calculating it), the courts have relied on a widely accepted set of criteria for determining the appropriate fee. *See* S. Speiser, Attorneys' Fees, §§ 8.4-8.21 (1973). Although many of those criteria overlap the factors approved by this Court in *Hensley* and its progeny, pre- (and post-) 1965 caselaw generally held that the courts should award a higher level of compensation where an attorney was only entitled to payment if the litigation was successful.

> The fact that an attorney's employment is undertaken on a contingent basis is a proper factor to be considered in assessing a reasonable compensation for his services, the courts generally taking the view that a larger fee will be authorized where its payment depends upon the attorney's success than where he is to be paid whether or not his efforts are successful.

Speiser, Attorneys Fees, v. 1, 319; *see id.* 319-20 n.56 (collecting cases). Prior to 1965, an attorney who had represented a Title II claimant would, in the absence of a

specific contractual agreement, have been entitled to a "reasonable" counsel fee, and a court determining that fee would have awarded a larger amount if the client had only agreed to pay the attorney if the case were won. *United States v. Anglin and Stevenson*, 145 F.2d 622, 630 (10th Cir. 1944). "[W]ell known difficulties and delays in obtaining payment of just claims . . . justifies a liberal compensation in successful cases, where none is to be received in case of failure." *Taylor v. Bemiss*, 110 U.S. 42, 45 (1884). Nothing in the text or legislative history of section 406(b) suggests that Congress intended to depart from this prevailing view of what would be a reasonable fee.

In *City of Burlington v. Dague*, 505 U.S. 557 (1992), this Court declined to authorize a contingency enhancement under fee-shifting statutes. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 717-22 (1987) (plurality opinion). *Dague* was explicitly and solely about the fee-shifting context and did not purport to establish a rule for other types of statutes. The propriety of a contingency enhancement depends on the purpose and context of the specific statute at issue. *See Underwood*, 487 U.S. at 572-73.

> [T]he considerations that led [this Court] to limit the use of risk-enhancement factors "under the usual fee-shifting statutes" . . . are inapplicable in the SSA context, where the award of attorney's fees is predicated on a pre-existing, consensual agreement between the attorney and the client. . . . The SSA fee provision itself recognizes that fee arrangements in this area of practice typically are based on a percentage of any

> past-due benefits ultimately received by the client. Given that reality, and the very real prospects of failure inherent in this field of practice, any reasonable fee must reflect the risks of loss and nonpayment.

Wells I, 855 F.2d at 45 (footnote omitted). Even after *Dague* the courts of appeals have been in agreement that some sort of contingency enhancement is appropriate under 406(b). *See, e.g., Allen v. Shalala*, 48 F.3d 465, 460 (9th Cir. 1995).

Many of the considerations that led to the holding in *Dague* are absent in a section 406(b) case. The primary purpose of fee-shifting statutes is to assure the availability of counsel to plaintiffs who seek to enforce statutes which Congress considered of particular importance. *Hensley*, 461 U.S. at 429. A contingency enhancement may not be necessary to accomplish that end. Section 406(b) was adopted for a very different purpose. Title II claimants already had attorneys; section 406(b) was adopted to assure that the attorneys already representing such claimants did not collect "inordinately large" legal fees.[47] That purpose is fully (indeed excessively) served by reducing a fee to a level in accordance with then prevailing legal standards, standards which expressly considered contingency. Not surprisingly, in the years immediately following adoption of section 406(b) it was the position of the Commissioner and the Department of Justice that the

[47] Section 406(b) also ensures that attorneys are paid by certifying payment of attorney fees out of past-due benefits.

contingent nature of section 406(b) fees warranted a higher level of compensation.[48]

One problematic aspect of a contingency enhancement under a fee-shifting statute is that it would impose a larger fee on defendants with the strongest (albeit ultimately unsuccessful) justification for their actions. Because in such cases there would be a high degree of risk that the suit would be unsuccessful, a greater enhancement would be warranted. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. at 725. Under section 406(b), however, there is no such perverse result. Because under section 406(b) the prevailing party pays the fee, it is the claimants with the more difficult (and thus riskier) cases who will, appropriately, pay a larger fee.

Although the denial of a contingency enhancement may generally reduce the willingness of attorneys to handle cases where success (and thus payment) are uncertain, under many statutes in which fee-shifting awards are authorized other considerations may compensate for this problem. The attorney might negotiate a contingent-fee agreement which may result in a fee larger (possibly much larger) than the lodestar calculation. *E.g., Venegas v. Mitchell*, 495 U.S. 82, 84 (1990) (lodestar award of $75,000; contingent fee award of $406,000). Some clients will be able to pay the attorneys on a fee-for-service basis, so that the lawyers will receive (at least some) compensation

[48] Brief for the Defendant-Appellant, *Webb v. Richardson*, No. 71-2010 (6th Cir.), 27 ("the fact that the fee is contingent is a relevant consideration").

regardless of the outcome of the case.[49] Precisely because fee-shifting provisions have been adopted by Congress to assure enforcement of laws of particular public importance, there will at times be charitable legal organizations willing and able to provide counsel without any assurance of compensation. Such ameliorating factors are rarely present in Title II cases.

Although Ninth Circuit precedent permits a contingency enhancement in a very limited number of cases, the standard applied by the courts of that circuit differs substantially from the type of enhancement that was established law when section 406(b) was enacted. At common law the contingency enhancement existed across the board, except perhaps in unusually easy cases. In the Ninth Circuit, on the other hand, enhancement is only permitted for cases which involve an unusually high degree of risk.[50] Because on average Title II lawsuits are ultimately successful in only about 35% of all cases, a Title II claim involving an unusually high degree of risk would be one with perhaps only a 10% chance of success. To the extent that the Ninth Circuit rule increases the availability of counsel, it does so only in cases which will almost all be lost, while providing no such incentives, for

[49] Such retainers are routine in individual employment discrimination cases.

[50] *Widrig v. Apfel*, 140 F.3d 1207, 1210 (9th Cir. 1998); *Straw v. Bowen*, 866 F.2d 1167, 1170 (9th Cir. 1989) ("unusually risky" case); *see* Pet'r App. 9 n.3.

example, for cases with a 50% (in Title II an above average) probability of success.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

Section 206(b) of the Social Security Act, 42 U.S.C. § 406(b), provides, in pertinent part:

(b) Attorney fees

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

. . . .

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

Section 206(a) of the Social Security Act, 42 U.S.C. § 406(a), provides, in pertinent part:

(a) Recognition of representatives; fees for representation before Commissioner of Social Security

(1) . . . The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

(2)(A) In the case of a claim of entitlement to past-due benefits under this subchapter, if –

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser of –

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant, then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 415(i) of this title since such date. The Commissioner of Social Security shall publish any such increased amount in the Federal Register.

(B) For purposes of this subsection, the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title.

(C) In any case involving –

(i) an agreement described in subparagraph (A) with any person relating to both a claim of entitlement to past-due benefits under this subchapter and a claim of entitlement to past-due benefits under subchapter XVI of this chapter, and

(ii) a favorable determination made by the Commissioner of Social Security with respect to both such claims, the Commissioner of Social Security may approve such agreement only if the total fee or fees specified in such agreement does not exceed, in the aggregate, the dollar amount in effect under subparagraph (A)(ii)(II).

(D) In the case of a claim with respect to which the Commissioner of Social Security has approved an agreement pursuant to subparagraph (A), the Commissioner of Social Security shall provide the claimant and the person representing the claimant a written notice of –

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(D) –

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to

the Commissioner of Social Security to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Commissioner of Social Security to increase the maximum fee. Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Commissioner of Social Security to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be conducted by the administrative law judge who made the favorable determination or, if the Commissioner of Social Security determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Commissioner of Social Security for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Commissioner of Social Security or by an administrative law

judge or other person (other than such adjudicator) who is designated by the Commissioner of Social Security.

(C) Upon completion of the review, the administrative law judge or other person conducting the review shall affirm or modify the amount which would otherwise be the maximum fee. Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

(4) Subject to subsection (d), if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall, notwithstanding section 405(i) of this title, certify for payment out of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title).

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), as amended provides, in pertinent part:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases

sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

. . . .

(2) For the purposes of this subsection –

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the

party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);. . . .

Further, the EAJA further provides, in pertinent part:

(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Pub. L. 99-80, § 3, 99 Stat. 186, amending Pub. L. 96-481.

(9)

Supreme Court, U.S.
FILED

No. 01-131

In the Supreme Court of the United States

GARY E. GISBRECHT, ET AL., PETITIONER

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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40 pp

QUESTION PRESENTED

Section 406(b) of Title 42, United States Code, provides that, when a claimant for benefits under Title II of the Social Security Act obtains a favorable court judgment awarding benefits, the court may award directly to the claimant's attorney a reasonable attorney's fee as a deduction from the claimant's back-benefits award, in an amount no greater than 25 percent of the back benefits awarded. The question presented is whether the court, when calculating that reasonable attorney's fee, should use an hourly-based "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain other adjustments), or should employ a rebuttable presumption that the attorney should receive 25 percent of the back benefits awarded, the maximum award permitted by the statute.

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In the Supreme Court of the United States

No. 01-131

GARY E. GISBRECHT, ET AL., PETITIONER

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 238 F.3d 1196. The decisions of the district courts (Pet. App. 17-22, 23-32, 33-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2000. A petition for rehearing was denied on April 20, 2001. Pet. App. 43. The petition for a writ of certiorari was filed on July 19, 2001, and was granted on November 26, 2001. The jurisdiction of this Court rests under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Social Security Act are reprinted in the appendix to the brief for petitioners. Pet. Br. App. 1-8.

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, establishes special rules applicable to efforts by attorneys to collect fees from their clients for representation in court in any case in which a claimant seeks old-age, survivor, or disability benefits under Title II of the Act.[1] Section 406(b) of Title 42 sets forth the exclusive method by which an attorney may obligate a claimant for Title II benefits to pay an attorney's fee in the event "a court renders a judgment favorable to a claimant." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999).[2] The statute directs the court to determine "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of" the favorable judgment. *Ibid.* Once the court has set the fee, the Commissioner of Social Security may deduct the fee amount from the claimant's payment of past-due benefits, and pay the fee directly to the attorney. *Ibid.*

In addition, a prevailing claimant for Title II benefits may seek an attorney's fee award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in any case in which the Commissioner's position in the litigation was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). Any EAJA fee is paid by the govern-

[1] No provision of the Act governs attorney's fee requests for litigation seeking Supplemental Security Income (SSI) benefits under Title XVI of the Act (42 U.S.C. 1382 *et seq.* (1994 & Supp. V 1999)). See *Bowen* v. *Galbreath*, 485 U.S. 74 (1988).

[2] "[N]o other fee may be payable or certified for payment for such representation except as provided in this paragraph." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999). "Any attorney who charges, demands, receives, or collects" a fee "in excess of that allowed by the court" under Section 406(b)(1) may be charged with a misdemeanor. 42 U.S.C. 406(b)(2).

ment out of the treasury, rather than being deducted from the claimant's past-benefits award. Congress expressly provided that an award under Section 406(b) of the Social Security Act "shall not prevent an award of fees and other expenses under section 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186. Congress also required that "the claimant's attorney refund[] to the claimant the amount of the smaller fee." *Ibid.* Thus, an EAJA award offsets an award under Section 406(b), so that the actual amount that the claimant receives out of the past-due benefits will be increased by the amount of the EAJA award up to the point the claimant receives 100 percent of the past-due benefits. EAJA imposes limits on the size of an award, including the express limit of fees to $125 per hour, which may be increased to reflect a cost of living adjustment. See 28 U.S.C. 2412(d)(2)(A) (Supp. V 1999).

2. Petitioners brought three separate actions in the district court for the district of Oregon under 42 U.S.C. 405(g), seeking social security disability benefits under Title II.[3] All three petitioners prevailed on the merits

[3] Although the claimants are named as the petitioners in this case, the real parties in interest are their attorneys, who are actually seeking to *decrease* the claimants' net awards of past-due benefits. See *Hopkins* v. *Cohen*, 390 U.S. 530, 531 n.2 (1968). Nevertheless, for ease of reference, we will follow this Court's practice in *Hopkins* (see *ibid.*) and refer to the claimants, rather than their attorneys, as petitioners.

Similarly, the Commissioner is the respondent because of her role as defendant in the underlying claims for benefits. The Commissioner, however, does not have a direct financial stake in the outcome of Section 406(b) fee litigation because the fee award generally will be deducted from the claimant's back benefits and will not result in an additional charge against the Treasury. The Commissioner thus serves a role in the litigation analogous to that of a trustee for the benefits claimant. Courts uniformly have per-

of their claims, with the district courts in each case reversing the decision of the Commissioner to deny benefits. Pet. App. 5. All three petitioners then sought attorney's fee awards against the Commissioner under EAJA, which all three district courts awarded.[4]

Counsel then moved for additional fee awards under Section 406(b). Attorneys Tim Wilborn and Ralph Wilborn represented petitioners in all three cases, and they asked in each of the cases for an award of the maximum amount of 25 percent of petitioners' back benefits. Pet. App. 19, 30, 33. The contracts signed by all three petitioners state that they agree to pay counsel 25 percent of past due benefits recovered, with no mention of any

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mitted the Commissioner or her regulatory predecessors to participate as a party in Section 406(b) attorney's fee litigation to represent the interests of the claimants and to ensure the proper administration of the statutory scheme. See, *e.g.*, *Burnett* v. *Heckler*, 756 F.2d 621, 624 (8th Cir. 1985) ("[T]he Secretary is entitled to participate in attorney's fee matters to protect the claimant's interest."). Accord *McKittrick* v. *Gardner*, 378 F.2d 872, 875 n.4 (4th Cir. 1967); *Lewis* v. *Secretary of HHS*, 707 F.2d 246, 248 (6th Cir. 1983); *Starr* v. *Bowen*, 831 F.2d 872, 874 (9th Cir. 1987). But cf. *Coup* v. *Heckler*, 834 F.2d 313, 325 (3d Cir. 1987) (recognizing Secretary's standing but suggesting role be limited to "explain[ing] what * * * an appropriate fee for the work in the district court would be, if calculated in accordance with the [Secretary's] standards"). In a prior dispute over attorney's fees under Section 406(b), this Court raised no question concerning the participation of the Secretary of Health and Human Services as respondent. *Hopkins*, 390 U.S. at 530. Indeed, because a social security disability claimant is unlikely to hire new counsel to litigate fee issues, the Commissioner generally will be the only party in a position to oppose an unreasonable fee request.

[4] Gisbrecht was awarded $3339.11 (Pet. App. 17); Miller was awarded $5164.75 in fees and $80.42 in expenses (*id.* at 27); and Sandine was awarded $6836.10 in fees and $253.16 in expenses (*id.* at 33).

other method for calculating fee payments, such as an hourly rate. *Id.* at 74, 79, 84.[5] In addition, counsel submitted affidavits, from themselves and other lawyers, asserting that it is the "universal practice," in Oregon and across the country, for counsel to undertake social security litigation on a contingency basis, with the claimant agreeing to pay counsel 25 percent of their retroactive benefits. *Id.* at 56, 60, 88, 89, 91.

In addition, counsel submitted excerpts from an Oregon State Bar Economic Survey (the Flikirs report), giving ranges of hourly rates for different types of lawyers. by geographic location in the state, years of practice, and subject-matter areas of practice. Pet. App. 93-97. Among the findings of this survey are that the statewide median rate for all lawyers is $130 an hour, with a range in Portland from a low rate of $25 an hour to a high rate of $300. *Id.* at 94. Lawyers with 4-6 years experience (like Tim Wilborn, who was principal counsel in these cases (see *id.* at 45)) have a median rate statewide of $115 an hour ($125 an hour in Portland). *Id.* at 95.

3. In all three cases, the district courts denied counsel's request for the statutory maximum of 25 percent of the back benefits awarded. Citing prior Ninth Circuit precedents in social security cases, the courts all calculated the fees by using the lodestar method (multiplying a reasonable number of hours spent by a reasonable hourly rate for the lawyer's local market). Pet. App. 18-19, 24-25, 29-30, 35. Each district court thus rejected counsel's argument that 25 percent of the

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[5] In affidavits addressing two of the cases underlying the petition, Tim Wilborn stated that his contract called in the alternative for $250 per hour. Pet. App. 50, 64. This appears to contradict the terms of the contracts themselves. *Id.* at 74, 84.

back benefits is the market rate on the grounds that it was contrary to Ninth Circuit precedent and was not supported by the record. *Id.* at 19-21, 24-25, 30-31, 36-38. Instead, all three courts adopted a rate of $125 per hour for Tim Wilborn (*id.* at 21) and refused to enhance the lodestar to take into account the contingent nature of the fees. *Id.* at 14, 21-22, 26, 39-40.[6]

4. Petitioners appealed all three cases, which the court of appeals consolidated for argument and decision. Pet. App. 5.[7] The court of appeals affirmed all of the fee awards. *Ibid.* At the outset of its decision, the court of appeals explained that it has long followed the lodestar method of calculating fees under Section 406(b), citing *Allen* v. *Shalala*, 48 F.3d 456, 458 (9th Cir. 1995), and *Starr* v. *Bowen*, 831 F.2d 872, 874 (9th Cir. 1987). Pet. App. 6. It noted that the Fourth, Fifth, and Eighth Circuits also follow the lodestar method,[8] but that the

[6] The *Miller* court set a separate rate for Ralph Wilborn at $150 per hour. Pet. App. 31.

[7] The consolidated court of appeals decision also considered the award in a fourth case, *Anderson* v. *Apfel*. See Pet. App. 4. In that case, the Wilborns asked for $10,013.50, calculated at $175 per hour, a sum that would have been 7.8 percent of the back-benefits award. *Id.* at 12. The district court in *Anderson* instead set the rate at $150 per hour. *Id.* at 15. Anderson joined the other three claimants as petitioner in this Court, but on November 26, 2001, this Court granted the petition only as to the three other claimants and denied it as to Anderson.

[8] Citing *Brown* v. *Sullivan*, 917 F.2d 189 (5th Cir. 1990); *Cotter* v. *Bowen*, 879 F.2d 359 (8th Cir. 1989); and *Craig* v. *Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324 (4th Cir. 1989). In addition to the three circuits cited by the court of appeals, the Third, Tenth, and Eleventh Circuits also follow the lodestar rule. See *Coup* v. *Heckler*, 834 F.2d 313 (3d Cir. 1987); *Hubbard* v. *Shalala*, 12 F.3d 946 (10th Cir. 1993); *Kay* v. *Apfel*, 176 F.3d 1322 (11th Cir. 1999). One other court of appeals, the First, has not

Second, Sixth and Seventh instead follow the "contingency" method, under which the court treats as presumptively reasonable the agreement between the claimant and the attorney to pay the attorney a percentage of the recovery.[9] The court explained that it has previously "noted the split of circuits and has rejected the contingency method expressly." *Id.* at 6 n.2 (citing *Allen*, 48 F.3d at 459).

The court of appeals rejected petitioners' argument that the "market rate" that should be used to calculate fees under the lodestar method is 25 percent of the past-due benefits. The court reasoned that to do so would "in essence" mean that it would be adopting the contingency method, even though it rejected that method in *Allen*. Pet. App. 7. To the extent that petitioners "are attempting to blur the distinction between the lodestar and contingency methods," the court held, "their argument is unavailing." *Ibid.* The court also found that the district courts did not abuse their discretion in setting hourly rates at $125 and $150 per hour, explaining that the Oregon State Bar survey shows those rates to be the average hourly rates for lawyers of comparable experience. *Id.* at 8.

In addition, the court rejected petitioners' argument that it should increase the lodestar to reflect the contingent nature of Section 406(b) cases as a class, noting that it had previously rejected such an enhancement in *Widrig* v. *Apfel*, 140 F.3d 1207, 1210-1211 (9th Cir.

explicitly required the lodestar method, but has rejected the contingency method. See *Ramos Colon* v. *Secretary of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988) (per curiam).

[9] Citing *Wells* v. *Sullivan*, 907 F.2d 367 (2d Cir. 1990); *McGuire* v. *Sullivan*, 873 F.2d 974 (7th Cir. 1989); and *Rodriguez* v. *Bowen*, 865 F.2d 739 (6th Cir. 1989) (en banc).

1998). Pet. App. 8-9. The court observed that petitioners "do not argue that any of these four cases was particularly risky on an individual basis." *Id.* at 9 n.3. The court held that to enhance the lodestar rates to take into account the fact that lawyers sometimes lose their cases and thus do not get paid under Section 406(b) is improper because it would mean "'essentially asking victorious claimants to "subsidize" the claims of losing claimants' by 'tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants.'" *Id.* at 9 (quoting *Straw* v. *Bowen*, 866 F.2d 1167, 1171 (9th Cir. 1989)).

SUMMARY OF ARGUMENT

Section 406(b) of the Social Security Act, enacted in 1965, grants courts the responsibility to "determine and allow * * * a reasonable fee" for attorneys who successfully represent claimants for Title II benefits. 42 U.S.C. 406(b) (1994 & Supp. V 1999). In the decades since Congress adopted this fee provision, courts have had extensive experience determining "reasonable" attorney's fees under many statutes, including 42 U.S.C. 1988(b) (1994 & Supp. V 1999), which, in language common to other fee-shifting statutes and to Section 406(b), authorizes courts to "allow * * * a reasonable attorney's fee" to prevailing parties.

Courts routinely calculate "reasonable" attorney's fees under such statutes by the lodestar method, under which the attorney submits documentation of the hours spent on the case and of the prevailing hourly rate in the local market for similar services. The court reviews those submissions and determines an appropriate number of hours and an appropriate hourly rate, which when multiplied together yield the total award.

The lodestar method has become a well-established feature of this Court's attorney's fees jurisprudence, and accordingly, there is "a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992) (citation omitted). As this Court held in *Hensley* v. *Eckerhart*, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. 424, 433 (1983). Just as with the fee-shifting statutes at issue in *Hensley* and its progeny, the lodestar method is the most appropriate one for courts to use to "determine and allow * * * a reasonable fee" in social security cases under Section 406(b). The text and legislative history of Section 406(b), which demonstrate Congress's intent that courts should "determine" a "reasonable" fee within the statutory cap of 25 percent of the back benefits awarded as a way to protect Title II Social Security claimants from abusive fee arrangements, confirms the appropriateness of the lodestar method.

Petitioners' alternative method—under which an award of 25 percent of the back benefits is presumptively reasonable—is inconsistent with the text and legislative history of Section 406(b). Indeed, petitioners' approach would turn Section 406(b) on its head, transforming the statute's maximum fee award into the presumptive minimum fee award as well. Rather than relying on such key fee-related factors as the quality and amount of the legal services provided, under petitioners' approach the size of the fee would depend primarily on factors relevant to the amount of back benefits owed but largely unrelated to a reasonable

rate, such as the amount of delay in obtaining the back-benefits award, the amount of the claimant's earnings and years of covered employment over the course of his career, and the number of the claimant's dependents. As a result, petitioners' approach would frequently overcompensate counsel at the expense of the very claimants Congress sought to protect by enacting Section 406(b).

The lodestar method, in contrast, does not produce such anomalous and unfair results. Rather, it is precisely tailored to provide the compensation for attorneys in each case that is appropriate for the legal services provided. That is what Congress intended by a "reasonable" fee.

Finally, for the same reasons this Court articulated in *Dague*, the lodestar in Section 406(b) cases should not be enhanced because an award of fees is contingent on an award of back benefits. Petitioners' proposed contingency enhancement would generally serve to make Section 406(b)'s 25 percent cap on fees the presumptive fee in most cases, and would frustrate the statute's primary goal of ensuring that the claimant keep as much of the back-benefits award as possible.

ARGUMENT

COURTS SHOULD USE THE LODESTAR METHOD TO DETERMINE A REASONABLE ATTORNEY'S FEE UNDER THE SOCIAL SECURITY ACT

A. The Lodestar Method Best Reflects The Plain Language Of Section 406(b)

1. Congress provided in Section 406(b)(1)(A) that when an attorney has represented a claimant for benfits and obtains a favorable judgment, "the court may determine and allow as part of its judgment *a reasonable fee* for such representation, *not in excess of*

25 percent of the total of the past-due benefits to which the claimant is entitled by reason of" the favorable judgment. 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999) (emphases added). The statute thus affirmatively grants the court, not the claimant and his attorney, the power to set a "reasonable" fee "not in excess of 25 percent" of the back benefits awarded. Accordingly, the amount of the fee award is expressly determined by the court as an exercise of its discretion within the parameters established by the statute. See, *e.g.*, *Kay* v. *Apfel*, 176 F.3d 1322, 1325 (11th Cir. 1999) ("courts have an affirmative duty to ensure that a Social Security claimant's attorney receives only a 'reasonable' fee, regardless of the contractual arrangements the claimant and his attorney may have reached"); *McKittrick* v. *Gardner*, 378 F.2d 872, 873 (4th Cir. 1967) ("our reading of the statute * * * requir[es] the court in every case to fix and determine a reasonable fee for services rendered in the court").[10]

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[10] Amicus the National Organization of Social Security Claimants' Representatives (NOSSCR) contends (NOSSCR Br. 7) that "[t]he lodestar method's initial focus on hours and rates * * * is inconsistent with the order in which Congress placed the phrases in §406(b)(1)" because it ignores Section 406(b)(1)'s initial requirement that there be a favorable judgment for the claimant. The requirement of determining that there is a favorable judgment before determining a reasonable fee, however, is not inconsistent with the lodestar method, as evidenced by the "prevailing party" requirement of most fee-shifting statutes. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Moreover, the requirement follows directly from the statute's prohibition of any fee award in cases that do not lead to a payment of back benefits. See note 2 *supra*. In reality, it is NOSSCR that seeks to reorder the statute, but contrary to its assertion (NOSSCR Br. 7-8), Section 406(b) does not require a court to apply the 25 percent limitation "before

Petitioners nevertheless contend that Section 406(b) restricts the court's role merely to determining the "upper limit of the range of reasonable fees" (Pet. Br. 40) and then reviewing the contract between the claimant and his counsel to determine whether the fee provided for by the contract is "within the range" of reasonable, non-abusive fees (*id.* at 16). According to petitioners, "nothing in [the] language or the legislative history of section 406(b) contemplates that the court should go further and select from within the range of non-abusive fees the amount which the judge thinks most appropriate." *Ibid.*

Petitioners' assertions are rebutted by the plain language of the statute. On its face, Section 406(b) gives a court the power to select a particular fee that it concludes is "reasonable," not just non-abusive. The statute provides for the *court*, not the claimant, his attorney, or their fee contract, to "determine" the "fee." Nothing in its language suggests that the court's role is limited to reviewing the existing fee contract and intervening only in the rare instance when that contract is abusive, as petitioners claim. The focus of the statute is on "a reasonable fee," not a "reasonable fee contract." Although the fee agreement itself may be a relevant factor courts can consider in determining the lodestar, see *Blanchard* v. *Bergeron*, 489 U.S. 87, 93 (1989), nothing in either the statute or this Court's decisions regarding attorney's fees suggests that the contractual fee should control the court's determination of a reasonable fee. *Id.* at 94 (lodestar remains "centerpiece of attorney's fee awards" even where "prevailing party

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reaching the 'reasonable fee' test." Rather, on its face, the statute first calls on the court to determine a reasonable fee, and then states that it may "not [be] in excess of 25 percent * * *."

and his (or her) attorney have executed a contingent-fee agreement").

Petitioners mistakenly contend (Pet. Br. 29) that it would be "anachronistic" to adopt the lodestar analysis for Section 406(b) claims because, when Congress enacted Section 406(b) in 1965, relatively few attorneys in private practice used hourly billing methods and the courts had not yet developed the formal lodestar analysis. This Court, however, has not hesitated to apply the lodestar method to other statutes requiring a "reasonable" fee, most notably the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), even though they were enacted before the development of the formal lodestar analysis. See *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989) (similar language between Section 2000e-5(k) and other attorney's fee provisions "is 'a strong indication' that they are to be interpreted alike"). Moreover, long before this Court formally adopted the lodestar method in *Hensley*, courts had rejected the central premise of petitioners' argument—that Section 406(b) requires courts to defer to a preexisting 25 percent contingency contract, rather than setting a fee the court deems the most reasonable. *E.g.*, *McKittrick*, 378 F.2d at 873-874 ("'Routine approval of the statutory maximum allowable fee should be avoided in all cases,' and this is true whether or not the fee claim has a contractual basis. * * * [Section 406(b)] requires the court to fix and allow a reasonable fee for services rendered" and "appears to contemplate no blind deference to contractual fee arrangements.") (citation omitted); *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) (same); *Webb* v. *Richardson*, 472 F.2d 529, 538 (6th Cir. 1972) (same), rev'd on other grounds, 35 F.3d 261 (6th Cir. 1994).

Petitioners attempt to find support for their reading of the statute in its use of the phrase "*a* reasonable fee" rather than "*the* reasonable fee." They argue that the indefinite article "a" suggests a range of reasonable fees, and that the existence of this range somehow alters the meaning of term "determine." Pet. Br. 20-21. According to petitioners, a requirement to "determine *the* reasonable fee" would "suggest[] that there is one particular fee that is reasonable, and * * * the court is to detect what it is," whereas "the phrase 'determine *a* reasonable fee' means only that the court will definitively resolve what the fee is, and that the fee chosen must be reasonable." *Ibid.* But Congress's use of an indefinite rather than a definite article in this case is too thin a reed on which to build a theory of statutory construction, especially in light of the "strong presumption" favoring the lodestar method. See *Dague*, 505 U.S. at 562.

To the extent the indefinite article suggests anything, it underscores the district court's discretion (and suggests an abuse of discretion standard of review). Thus, the existence of a range of reasonable fees is in no way inconsistent with the lodestar analysis, as even petitioners are forced to concede. See Pet. Br. 21 (phrase "determine *a* reasonable fee" "does not purport to indicate how the court is to make the choice among the range of fees that would be reasonable"). Indeed, far from being inconsistent with the lodestar method, such discretion is one of the lodestar method's principal attractions. See *Blanchard*, 489 U.S. at 87 ("a private fee arrangement is but one of the many factors to be considered and cannot, standing alone, impose an automatic limitation on the exercise of the trial judge's discretion, which is central to the operation of [Section 1988's "reasonable fee" requirement]").

Petitioners' asserted presumption in favor of a fee award equal to 25 percent of back benefits would render Section 406(b)'s requirement of a "reasonable" fee largely meaningless. The term "reasonable" generally signals a preference for a contextual analysis taking a variety of factors into account. See, *e.g.*, *United States* v. *Arvizu*, 122 S.Ct. 744, 751 (2002) ("reasonable" suspicion requires courts to look at "totality of the circumstances," and should not be reduced to "'a neat set of legal rules'") (quoting *Ornelas* v. *United States*, 517 U.S. 690 (1996)). Yet petitioners' urge what amounts to a single variable analysis. Petitioners would convert the 25 percent ceiling into the presumptive floor as well, and courts always would award a fee of 25 percent, except in the unusual case where such a high fee would be clearly "abusive."[11] But Section 406(b) does not say that counsel will get 25 percent unless that amount is abusive or outside the "outer limit of reasonableness" (Pet. Br. 27 (citation omitted)). Rather, it says that counsel will get "a reasonable fee * * * not in excess of 25 percent * * *," as determined by the court. Thus, as the text of Section 406(b) indicates, the touchstone of the statute is a reasonable fee, with 25 percent

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[11] Thus, for example, the Sixth Circuit, which generally follows petitioners' contingency method, would reduce a fee award below 25 percent of the back benefits where counsel's improper conduct delayed the final judgment, thereby causing the amount of back benefits to increase (which in turn would increase the fee award under a straight 25 percent calculation), or where counsel "would otherwise enjoy a windfall because of either an inordinately large benefit award or from minimal effort expended." *Rodriquez*, 865 F.2d at 746. Unlike petitioners' presumption, however, the Sixth Circuit has indicated that, regardless of the fee contract, courts "should only allow maximum fees for extensive effort on the part of counsel who have overcome legal and factual obstacles to the enhancement of the benefits awarded to his client." *Id.* at 747.

the upper limit, not, as petitioners would have it, a 25 percent fee, with unreasonableness as an infrequent exception.[12]

Moreover, if, as petitioners contend, Congress had intended for courts merely to set the "upper limit of the range of reasonable fees" (Pet. Br. 40) and to defer to any agreement between the attorney and claimant within that limit, it would have written a very different statute. Notably, at the time Congress enacted Section 406(b) in 1965, a preexisting provision regulating attorney's fees for work done before the agency provided that the agency "may, by rule and regulation, prescribe *the maximum fees which may be charged* for services performed in connection with any claim before the [agency]." Act of Aug. 10, 1939, Pub. L. No. 76-379, § 201, 53 Stat. 1362, 1372 (emphasis added). The 1965 amendments simultaneously retained this authorization for the agency to set "maximum" fees in administrative proceedings (as Section 406(a) of the Social Security Act) and enacted Section 406(b) to regulate court-related attorney's fees. Rather than limiting courts to determining the "maximum" fees allowable for a particular representation, however, Congress chose to

[12] Yet another problem with petitioners' excessive focus on the percentage fee set in the contracts, which is uniformly set at 25 percent of the back benefits awarded, is that Congress already provided substantial guidance about what amount of fees are reasonable in relation to the amount of back benefits awarded, namely not more than 25 percent. The lodestar method gives the court a meaningful role by allowing them to determine what fees would be reasonable in relation to other factors, such as hours worked or the difficulty of the issues. By forcing courts to focus on fee contracts that uniformly reflect the 25 percent statutory cap, petitioners' methodology renders both the court's role and the statutory phrase "a reasonable fee" largely redundant.

authorize courts to "determine * * * *a reasonable fee*." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999).[13]

Petitioners' assertion that "reasonable" as used in Section 406(b) only permits the court to determine the "outer limit of reasonableness" (Pet. Br. 27 (citation omitted)) would render meaningless the obvious textual differences between Section 406(b)'s authorization for courts to "determine * * * a *reasonable* fee" and the then-existing Section 406(a)'s authorization for the agency to "prescribe * * * *maximum* fees." Moreover, Congress in January 1968 amended Section 406(a) to add authority for the agency to "fix * * * *a reasonable fee*" for work done before the agency. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 173, 81 Stat. 877 (emphasis added). Petitioners' contention that determining "a reasonable fee" means determining only the maximum "non-abusive" fee is thus belied by the 1968 amendments granting the agency, which already had the authority to establish "maximum" fees, the additional power to set "a reasonable fee."

Finally, petitioners' proposed rule also is inconsistent with the statutory text because it renders the 25 percent ceiling an ineffective check on excessive fee awards. Under the lodestar method, courts focus on the reasonableness of fees and consider the amount of

[13] To counterbalance this more intrusive regulation of court-related fee awards, Congress provided for the direct payment of attorney's fees out of the award of back benefits, thereby eliminating the substantial problems lawyers had faced in collecting fees from Social Security claimants, who generally had few if any assets. See 42 U.S.C. 406(b)(1)(A); *Cotter*, 879 F.2d at 360 ("Enacted in part in response to 'inordinately large' contingency fee awards, Congress also sought through section 406 to ensure representation of Social Security disability claimants by providing for payment of a 'reasonable fee' directly from past due benefits.").

work performed and the difficulty of the issues involved. The resulting presumptive fee award is calculated *in dollar terms* and is determined *independently* of the amount of *back benefits awarded.* As a result, the 25 percent ceiling provides a meaningful independent check on the dollar-based fee award. Petitioners' rule, by contrast, would generate the presumptively reasonable fee based on the fee contract, which typically calculates the fee award as a *direct* percentage (25 percent) of the back benefits awarded. Because petitioners' presumptive fee award is not generated independently of the amount of back benefits, the 25 percent of back benefits ceiling provides no meaningful independent check on the fees. At best, district courts would be left to their own devices to determine, for example, that a 20 percent award appears more reasonable than a 25 percent award, and at worst the statute would be rendered meaningless. To avoid this problem in the one context (administrative fees) in which the statute allows attorney's fees to be measured in part based on the contractual terms, the statute provides a dollar cap in addition to the 25 percent ceiling. See 42 U.S.C. 406(a)(2) (administrative fees not to exceed $4000). Thus, in that context, the dollar cap provides a meaningful and independent check on the amount of fees.

B. The Text And Legislative History of Section 406(b) Demonstrates That Congress Did Not Intend Courts To Defer To Attorney-Claimant Fee Contracts

The text of Section 406(b) demonstrates that Congress did not adopt a regime, like that envisioned by petitioners, that gives deference to contractual fee arrangements between the claimant and his attorney. The statute, by its terms, grants courts the authority to

determine the fee, and specifically provides that a contract providing a fee in excess of 25 percent can never be honored by the courts. Congress then removed any doubt on that score by limiting attorneys to the court-determined fee and forbidding any other privately-ordered fee arrangement. 42 U.S.C. 406(b)(2). A rule giving presumptive validity to privately-negotiated fee arrangements is inconsistent with the statute's text.

The legislative history confirms that deference to a 25 percent contingency contract would be contrary to Congress's intent. Congress adopted the fee provision of Section 406(b) in 1965 to prevent the often excessive fees lawyers in social security cases were charging at that time. The Senate Report explained the Committee's findings:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965). Congress thus enacted Section 406(b) as a response to the problem of lawyers charging their Title II clients "inordinately large fees," and Congress cited as examples of such abusive fees contingency contracts calling for payment of "one-third to one-half" of the back benefits. Indeed, petitioners themselves acknowledge

(Pet. Br. 31) that "[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants."

The committee report reflects Congress's concern that lawyers who handle Social Security cases have unequal bargaining power over persons who seek benefits, thus allowing the lawyers to extract unfairly generous terms in their employment contracts. A presumption that the attorney's fee award should be 25 percent of the back benefits because that is what the contract provides is inconsistent with this congressional concern. It is unlikely that Congress, having concluded that agreed-upon attorney's fees that "upon occasion" total 33 percent of the back benefits are abusive, intended a standard that would require courts to uphold attorney's fees of 25 percent (only 8 percent less) in all but the exceptional cases. Congress's desire to outlaw 33 percent fee payments suggests that the 25 percent figure was truly intended as a ceiling and awards of that magnitude should be allowed only in the occasional case where counsel can persuade the court that a fee that high is appropriate based on the particular facts of that case.

The very record that was made below by petitioners suggests that problems with unequal bargaining power continue today. All three contracts in the cases that underlie this petition called for a flat fee of 25 percent of back benefits—the maximum allowed by Congress. Pet. App. 74, 79, 84. Moreover, counsel submitted affidavits from themselves and from other lawyers in various parts of the country, all of which assert that it is the "universal practice" for lawyers throughout the country to obtain agreements from their clients in social security cases on exactly those terms. *Id.* at 56, 60, 88, 89, 91. In other words, Social Security claimants appear

to lack the ability to bargain meaningfully with their lawyers over the price for legal services. Rather, virtually all counsel demand and receive agreements for a fee at the statutory maximum.

Accordingly, those courts that follow petitioners' proposed contingency method are mistaken when they say that "the best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." *Wells* v. *Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990). To the contrary, Congress gave the courts the responsibility of determining a reasonable fee precisely because it concluded that claimants were not able to negotiate attorney's fees freely, but rather were often compelled to agree to "inordinately large" contingent fee arrangements with fixed percentages. See *Kay*, 176 F.3d at 1326 ("Our preference for the lodestar method also reflects the fact that §406(b) is designed to protect a particularly vulnerable class of claimants. Many claimants in Social Security benefits cases are minors, or incompetent to manage their affairs, or disadvantaged by lack of education or by physical or mental impairments.") *Cotter*, 879 F.2d at 360 ("Section 406 is a *parens patriae* limit on the amount of fees an attorney may receive from a disability claimant, usually an individual of limited resources, who suffers the additional handicap of a severe physical or mental disability."). Likewise, the very fact that the prevailing "agreement" nationwide is for the statutory maximum underscores the continuing need for courts to determine reasonable awards independent

of either the amount of back benefits or the fee arrangement "agreed to" by the claimant.[14]

Finally, the Senate Report expressed the particular concern that fee agreements that call for a percentage of the back benefits can generate an excessively high attorney's fee because "litigation necessarily involves" extensive delays that "in many cases" can produce a high award of back benefits and therefore a large percentage fee. Congress recognized the potential for substantial delays, not only for the administrative process, which often requires delays for processing benefits claims and exhausting administrative remedies, cf. *Heckler* v. *Day*, 467 U.S. 104 (1984), but also for the judicial process of reviewing agency determinations regarding benefits, which can involve extensive delays that vary significantly from one district to another. Congress expressly found that such delays make it unfair to allow attorney's fees to be based blindly on a percentage of back benefits because such a method of setting fees can frequently create excessive fees that have little or no relationship to the quality or amount of legal services provided.

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[14] Notably, amicus the Association of Trial Lawyers of America (ATLA) repeatedly concedes that the lodestar method is appropriate "as a proxy for market forces in those situations where no real market exists which serves the statutory purpose." ATLA Br. 10; *id.* at 3 ("The lodestar method provides a means of approximating the market value of legal services in circumstances where market forces cannot be relied upon to further the purposes of the statute."); *id.* at 5 ("[T]he lodestar model is useful in those circumstances * * * where market forces cannot be relied on to set a reasonable fee."). What ATLA and petitioners fail to recognize, however, is that Congress has expressly determined that the market for legal services for Social Security claims is precisely the kind of unreliable market for which the lodestar method is designed.

C. The Lodestar Method Produces A More Reasonable Result Than The Presumptive 25 Percent Contingency Method

The lodestar method of calculating an attorney's fee has the great virtue of looking at the amount of work that counsel actually devoted to a case in determining the proper fee. Logic amply supports the idea, indeed presumption, that a "reasonable" attorney's fee should be based on documentation of the hours that the attorney spent on the case and identification of the fair hourly rate charged by lawyers of similar skill, experience, and reputation in the local market. Under that method, the fee awarded accurately reflects the value of the services rendered by the attorney. By contrast, petitioners' rule that presumptively allows a fee of 25 percent of the back benefits awarded is illogical because it determines whether a fee is reasonable based primarily on factors having much to do with the amount of benefits owed, but little to do with the value of the services actually provided.

Under petitioners' approach, cases involving identical efforts by the attorneys frequently would generate largely disparate fees, depending on such non-fee related factors as the accumulation of accrued benefits due to delay caused by the backlog of cases at each administrative and judicial level of review, the number of dependents a claimant has, and the monthly benefit level that the claimant seeks, which itself varies based on the claimant's income when he was working and the number of years in which he contributed payroll taxes. As the Fourth Circuit rightly observed in *McKittrick*: "The rate of accrual of benefits varies without any relation to the merits of the claim. It is fixed by such things as the claimant's prior earnings and the number of his dependents. The issue in the usual case is

entitlement to benefits; their computation is rarely in question. Unlike personal injury actions, therefore, the amount of the recovery bears no relation to the lawyer's skill, effort or effectiveness." 378 F.2d at 874.

For the same reasons, under petitioners' method, cases with the same amount of back benefits necessarily would produce the same attorney's fees, even when the work that counsel put into the cases varied considerably. Thus, a straightforward case in which counsel filed a short complaint and a short summary judgment memorandum, both containing substantial amounts of boilerplate, would generate the same fee as a case involving novel issues in which counsel had to file lengthy briefs before the magistrate judge, the district court, and the court of appeals, with oral hearings at each level.

Moreover, as some courts have noted, the contingency method creates perverse incentives for attorneys handling Title II claims. "If, in these cases, a contingent fee contract governs the amount of the fee, the dilatory lawyer is given a premium; the prompt, effective lawyer who moves expeditiously is penalized. The regrettable delays in the final adjudication of these claims, in large measure, may be unavoidable, but they should not be compounded by incentives for procrastination and delaying tactics on the part of a claimant's attorney." *McKittrick*, 378 F.2d at 874; see also *Webb*, 472 F.2d at 537. As discussed above, Congress expressly stated that Section 406(b) was intended in part to solve the problem of excessive fees caused by delay. S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965).

Petitioners presumably would allow the court to reduce the fees in cases at the extreme. But it is a strange view of reasonableness that would allow courts routinely to award *different* fees to attorneys doing the

same amount of work and *identical* fees to attorneys doing vastly *different* amounts of work. A statute that calls upon courts to set "a reasonable fee" should not be allowed to produce frequent fees that significantly overcompensate counsel, with the courts stepping in only occasionally when the overcompensation is so great that it becomes egregious. Congress adopted Section 406(b) to protect *all* Social Security claimants and to assure a fair attorney's fee in *all* cases, not simply to eliminate a few extreme cases of excessive fees. After all, "while the attorney's compensation must be sufficient to encourage members of the bar to undertake representation of disability claimants, the disability award, from which the attorney's fee is paid, is normally an already-inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr* v. *Bowen*, 831 F.2d 872, 873 (9th Cir. 1987). A lodestar fee, particularly one that will be paid directly to the lawyer out of the back-benefits award, will encourage sufficient counsel—as it evidently did in each of the cases that underlie this petition, which were all brought despite the Ninth Circuit's well-established use of the lodestar method—without unduly reducing the benefits upon which petitioners rely to meet their daily expenses.

Notably, neither petitioners nor their amici seriously contend that a lodestar approach under Section 406(b) would deny Social Security claimants adequate access to counsel. The provisions of Section 406 providing for direct payment of attorney's fees by the agency out of the award of back benefits, thereby *guaranteeing collection* of fees, provides substantial inducement for attorneys to take Social Security cases. See *Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. 512-513 (1965). Courts in certain

circuits have been applying the lodestar method to Section 406(b) cases for decades. Petitioners have pointed to no evidence suggesting that Social Security claimants in lodestar jurisdictions lack adequate access to counsel, and to the Commissioner's knowledge, no such evidence exists.

D. Using The Lodestar Method To Determine Court-Related Fees Is Consistent With The Methods Set By Section 406(a) For Determining Agency-Related Fees

Petitioners mistakenly argue that a reading of Section 406(b) that would allow only a lodestar calculation of the fee would be inconsistent with what they contend is the more generous contract-based method for calculating attorney's fees for work done in Title II cases at the administrative level, which are governed by 42 U.S.C. 406(a). In fact, Section 406(a) demonstrates that Congress knows how to create a system for awarding fees that gives presumptive weight to a private agreement when it wants to and confirms the appropriateness of applying the lodestar method to determine court-related fees.

Section 406(a) provides two methods by which counsel representing Social Security claimants before the agency can obtain fees. The first method, known as the fee petition process, is provided for in 42 U.S.C. 406(a)(1), which authorizes the Commissioner to "fix * * * a reasonable fee" for the attorney's services. Under the Commissioner's regulations governing this process, the attorney must submit a fee petition setting forth a detailed description of the services provided and expenses incurred in representing the claimant before the agency. The agency official who authorizes the fee, typically an administrative law judge (ALJ), then evaluates the information in the petition and sets a

reasonable fee to reflect the value of the legal services provided. The ALJ will "not base the amount of fee [he] authorize[s] on the amount of the [back] benefit alone, but on a consideration of all the factors listed in" the regulations, which are similar to traditional lodestar factors and include "[t]he complexity of the case," "[t]he level of skill and competence required" of the attorney, and "[t]he amount of time * * * spent on the case." 20 C.F.R. 404.1725(b)(ii), (iii), and (iv).

The second process by which an attorney can get fees for representing a claimant before the agency is known as the fee agreement process and is governed by 42 U.S.C. 406(a)(2). Under this process, if the claimant and his attorney sign and submit a written fee agreement before the agency renders a favorable determination on the claim, the agency will generally approve the agreement if the fee specified therein does not exceed a statutory cap, which is the lesser of 25 percent of the claimant's past due benefits or $4000.[15]

Petitioners contend (Pet. Br. 21) that using the lodestar method to determine court-related fees would be inconsistent with 406(a)(2)'s fee agreement process, which they characterize as "authoriz[ing] awards based on contingent fees for legal representation in the administrative process." But the differences between the fee agreement process of Section 406(a)(2) and court-determined fees under Section 406(b) (or for that matter the fee petition process of Section 406(a)(1)) reflect the markedly different statutory terms gov-

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[15] Under 42 U.S.C. 406(a)(2)(A)(iii), the Commissioner may increase the $4000 limit to reflect the rate of increase in primary insurance amounts since January 1, 1991. Effective February 1, 2002, the Commissioner has set the new limit at $5300. See 67 Fed. Reg. 2477 (2002).

erning the different fee-setting processes. Congress created the fee agreement process of Section 406(a)(2) as an *alternative* to the Commissioner's authority to determine "a reasonable fee" through the fee petition process of Section 406(a)(1), and it had to amend Section 406(a) to provide this alternative precisely because, as the agency's regulations have long recognized, the Commissioner's authority to fix "a reasonable fee" required the agency to undertake an independent evaluation of the value of the legal services provided, rather than merely presume that the contractual fee was the reasonable fee. Accordingly, the distinct nature of the Section 406(a)(2) fee agreement process reflects its distinct role in that statutory scheme. Just as it has no relevance to the Commissioner's implementation of Section 406(a)(1)'s requirement of determining a "reasonable" fee, it has no relevance to the method courts should use in determining a "reasonable" fee under Section 406(b).

In any event, the fee agreement process is not as generous to counsel as petitioners make it seem. On its face, the fees under this expedited option cannot exceed $4000. Moreover, if a case is resolved favorably to the claimant at the administrative level, without the need to seek judicial review and the attendant delay, it is likely that the back-benefits award will be far lower than after litigation, and thus 25 percent of those benefits would produce a significantly smaller fee. In those cases where counsel expect that the claim will generate especially large amounts of back benefits, counsel would likely avoid application of Section 406(a)(2)'s $4000 cap, and seek certification of "a reasonable fee" by the Commissioner under Section 406(a)(1)'s fee petition process. But as discussed above, any fee awarded through that process would not be based on the contingency con-

tract, but would be set independently by the agency to reflect the value of the legal services based upon the factors set forth in 20 C.F.R. 404.1725(b). Moreover, a claimant can timely challenge a fee as excessive in light of the actual services performed. See 42 U.S.C. 406(a)(3).

Finally, more than anything else, the fee agreement process in Section 406(a)(2) demonstrates that Congress knew how to write a statute making the contract between the attorney and claimant presumptively binding subject to a ceiling. Congress did so expressly in Section 406(a)(2) as an alternative to the reasonable fee determination process of Section 406(a)(1). Whatever anomalies may be produced by the fact that Section 406(a)(2) adopts a different regime than the procedures for fees in court cases under Section 406(b), petitioners cannot explain how this Court could (let alone should) harmonize the two modes of awarding fees in light of the starkly different statutory language.

E. Neither A Presumptive 25 Percent Fee Award Nor A Risk Enhancement Of Lodestar Awards Is Appropriate To Reflect The Contingent Nature Of The Fee Awards

Petitioners mistakenly contend (Pet. Br. 34-36) that the lodestar method is inappropriate for Title II litigation because of the contingent nature of fee awards under Section 406(b). In *Blanchard*, however, this Court reaffirmed the general applicability of the lodestar method to attorney's fee claims, including contingent ones, stating: "We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement. To the contrary, in *Hensley* and in subsequent cases, we have adopted the lodestar approach as the centerpiece of attorney's fee

awards." 489 U.S. at 94. Although *Blanchard* left open the possibility that contingency could be a factor considered by the court in determining whether to enhance a lodestar calculation—a possibility since foreclosed by this Court's decision in *Dague*, 505 U.S. at 563-566—the *Blanchard* Court held that neither contingency nor any other factor "is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." 489 U.S. at 94.

As an alternative to their proposed presumption in favor of a 25 percent attorney's fee, petitioners argue (Pet. Br. 42-47) that if the Court adopts a lodestar analysis, it should allow an enhancement of fee awards in social security cases *as a class* to reflect the risk inherent in such cases. There would appear to be little if any practical difference between these two proposals.[16] But any method of calculating fees that increases the fee beyond the base lodestar to reflect the contingent nature of Section 406(b) claims would be improper for the same basic reasons this Court rejected a contingency enhancement for fee-shifting statutes in *Dague*. That is true, moreover, whether the contingency enhancement is based on the riskiness of Section 406(b) claims as a class, as petitioners contend it should

[16] The lodestar fee calculations in these three cases (before the mandatory offset for the EAJA fee awards) were $3135.00 (*Gisbrecht*), $5461.50 (*Miller*), and $6550 (*Sandine*). Pet. App. 18, 31, 40. Petitioners had asked for the maximum award of 25 percent of back benefits, which would have been $7091.50, $7514, and $13,988 respectively. See Pet. Br. 8. Petitioners never give a figure as to the size of the risk enhancement they seek, but even if an enhancement is limited to doubling the lodestar (which would only partially reflect their asserted 35 percent success rate in social security cases), that would bring these three awards near to or well over the 25 percent statutory maximum.

be, or whether the contingency enhancement is based on the riskiness of the particular case, as the Ninth Circuit has held, see *Allen*, 48 F.3d at 460.[17]

The Court in *Dague* articulated several reasons for rejecting both general and case-specific contingency enhancements for fee-shifting statutes, and those reasons are equally applicable to Section 406(b). The *Dague* Court rejected a contingency enhancement based on the riskiness of the particular case both because it "would likely duplicate in substantial part factors already subsumed in the lodestar," and because it would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." 505 U.S. at 562-563; see also *id.* at 563 ("[E]nhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately

[17] Although a number of circuits applying the lodestar method to Section 406(b) claims have held that courts may consider contingency in determining whether an enhancement is warranted, only the Ninth and Eleventh have addressed the issue post-*Dague*. See *Allen*, 48 F.3d at 460 (applying only case-specific contingency factor); *Kay*, 176 F.3d at 1327 & n.5 (permitting consideration of contingency as an enhancement factor, but emphasizing "its presence in a given case would not necessarily require an adjustment in order to produce a reasonable fee; the lodestar amount itself may suffice"). Those decisions are flawed. Fee-shifting statutes like those at issue in *Dague* closely resemble Section 406(b), in that both (1) authorize "reasonable attorney * * * fees," and (2) only if the plaintiff prevails. The difference that *Allen*, *Key*, and petitioners emphasize—that fee-shifting statutes impose fees on another party who has not negotiated a fee arrangement, while Section 406(b) directs the fees to come from the claimant who has agreed to a fee—is of little impact in light of Congress's determination that fee "agreements" in this area are distorted. See *supra* at 20-22.

encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the 'reasonable fees' provisions."). Both of these reasons apply equally to Section 406(b) claims.

The *Dague* Court also noted that a general class-based enhancement would be difficult to apply, especially in the absence of a functioning, unregulated market for such fees. 505 U.S. at 564. In addition, such an enhancement would "pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail," thereby violating at least the spirit of the "prevailing party" requirement; deviate from the consistent trend of Supreme Court cases "turn[ing] away from the contingent-fee model"; and frustrate both the "interest in ready administrability that has underlain our adoption of the lodestar approach" and "the related interest in avoiding burdensome satellite litigation." *Id.* at 565-566; see also Pet. App. 9 (noting petitioners are "'essentially asking victorious claimants to "subsidize" the claims of losing claimants' by 'tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants'") (citation omitted). Again, each of those concerns applies with full force to attorney's fee claims under Section 406(b).

Notwithstanding *Dague*, petitioners contend (Pet. Br. 44) that Section 406(a) warrants a contingency enhancement, even though fee-shifting statutes do not, because "[t]he primary purpose of fee-shifting statutes is to assure the availability of counsel," whereas Section 406(b) "was adopted to assure that the attorneys already representing [Title II] claimants did not collect 'inordinately large' legal fees." That statement, while true, provides an additional reason for *rejecting* a contingency enhancement, not a reason for adopting one. As petitioners themselves concede (Pet. Br. 31),

"[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants." Because the contingency enhancement that petitioners propose would systematically *reduce* claimants' net benefits, that purpose counsels strongly against any contingency enhancement for fee claims under Section 406(b).

Similarly mistaken is petitioners' argument (Pet. Br. 35-36) that absent an enhancement the relatively low rate of success of Title II judicial challenges would result in an hourly rate substantially below the average market rate for lawyers of comparable seniority and skill that handle other types of cases. As petitioners themselves point out (Pet. Br. 34-35), Title II cases are "unique" in that they often are less complicated than other types of litigation, are generally resolved on summary judgment, and typically involve fewer than 40 hours of legal work. Accordingly, that rates for Title II representations may be less than rates for more complicated litigation is not necessarily a reason for an enhancement.

Petitioners' analysis, moreover, ignores that Section 406(b) fees generally are paid directly to the lawyers out of the award of back benefits, thereby eliminating many of the risks and other costs typically associated with collecting fees. This increased certainty of payment, which Congress intended as the primary assurance that attorneys would undertake Title II representations, was part of the balance that Congress struck when it limited the size of Section 406(b) fees. This direct-payment feature may be one reason why there does not appear to be any documented shortage of lawyers willing to take Title II cases. Petitioners, who themselves undertook the representations in this case in a lodestar jurisdiction without a reasonable

expectation of an enhancement (see Pet. Br. 46), have provided no basis for diverting much needed benefits away from Social Security claimants to provide an additional inducement to attorneys in the form of a contingency enhancement.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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No. 01-131

In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, and NANCY SANDINE,

Petitioners,

vs.

JO ANNE B. BARNHART, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. INTRODUCTION

The government frames the issue in this case as posing a simple, stark choice. The government's own proposal is that counsel fees under 42 U.S.C. § 406(b) should be calculated using the methodology approved in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), for fee-shifting statutes. The only possible alternative to the *Hensley* methodology, the Solicitor General suggests, would be for the courts in all cases to award a 25% contingent fee, an alternative that the government's brief then attacks with enthusiasm. This Court, however, is entirely capable of framing a legal standard between these two alternatives; several lower courts have done so, and that is precisely the course which we urge.

The government's characterization of the alternatives between which the Court must choose appears to rest in part on a misapprehension of the position advanced by Petitioners. The government suggests, for example, that Petitioners recognize only a single consideration relevant to a fee determination: the amount of the recovery multiplied by 25%. It describes Petitioners as proposing a "single variable analysis" (U.S. Br. 15) – the sole variable apparently being the amount of benefits recovered – and as leaving federal judges "to their own devices" in deciding when a fee request could be disapproved. (U.S. Br. 18.) To the contrary, in our opening brief we identified at least four other factors which a court should also consider in determining whether a fee request is reasonable – whether the amount of the fee was "inordinately large" in comparison with the legal work done, whether the plaintiff's attorney was responsible for undue delay, the net fee the claimant would actually pay after deduction of any EAJA fee payable by the government, and the size of the combined fees for representation in court and representation in the administrative process. (Pet. Br. 17, 22-24, 33-34, 39-41.)

The government repeatedly objects that Petitioners propose an interpretation of section 406(b) under which

there would be no connection whatever between the fee awarded and the value of the legal services provided. (U.S. Br. 23.) To the contrary, it is our position that a court in determining a fee would be obligated to assure that the amount of any agreement-based fee was reasonable in light of the amount and nature of the legal services provided. (Pet. Br. 17, 24, 39.) On our view the non-contingent value of the legal services would not ipso facto *be* the appropriate fee, but that value would be relevant in determining whether the fee requested would be a "windfall." *Cf. Venegas v. Mitchell*, 495 U.S. 82, 85-86 (1990) (district court concluded that the fee provided for in a fee agreement was not a "windfall").

The government incorrectly describes Petitioners as urging this Court to adopt a "presumption" that the fee awarded under section 406(b) should be whatever fee (subject to the 25% cap) is in the fee agreement.[1] To the contrary, we acknowledge that the attorney seeking a fee award bears the burden of persuading the court of the reasonableness of a proposed fee. We made our position on this issue crystal clear in our opening brief: "the statute does not create any presumption in favor of the agreed upon amount." (Pet. Br. 40.)

The government's characterizations of our position may constitute, not a misunderstanding, but simply a rhetorical flourish. The Solicitor General may intend only to assert that our proposed standard, although on its face requiring judicial scrutiny of fee applications, will nonetheless result in practice in "blind" judicial approval of all contingent fee requests. The government, however, offers no explanation of why this would occur. Although the lower courts in several circuits already attach significance to the existence of fee agreements in section 406(b) cases, the government does not suggest that those courts have given unthinking approval to contract-based fee

[1] U.S. Br. i, 9 (twice), 15 (three references), 18 (twice), 19, 20, 23 (twice), 26, 28, 29 (twice), 30.

requests. The role accorded to federal judges by section 406(b) is in our view more limited in certain respects than that which judges typically play under fee-shifting statutes, but federal judges assuredly can be relied on to fill either role with care and diligence.

II. THIS COURT'S DECISIONS REGARDING FEE-SHIFTING STATUTES DO NOT RESOLVE THE ISSUES PRESENTED BY SECTION 406(b)

The premise of the government's brief is that in determining counsel fees under section 406(b) the courts should utilize the standard developed for calculating fees under fee-shifting statutes such as 42 U.S.C. § 1988. The practical problem posed by this suggestion is that section 406(b) cases ordinarily involve different circumstances and thus raise issues quite unlike what occurs under fee-shifting statutes. In section 406(b) cases (i) there is usually a contract between the attorney and claimant regarding the amount of the fee at issue, (ii) the net fee the claimant will actually pay often is greatly reduced by an EAJA[2] award, (iii) the total fees the claimant must pay is often increased by a separate additional award for work done in the administrative process, and (iv) the amount of the fee sought is ordinarily sufficiently small that any extended litigation would be prohibitively expensive. Because of the limited relevance of decisions under fee-shifting statutes, it is not always clear exactly what standard the government is urging this Court to adopt for section 406(b) cases.

(1) What Significance May Or Should Be Attached To A Contractual Agreement Between The Attorney And The Claimant?

The government in at least one passage appears to maintain that under its standard a court must consider

[2] 28 U.S.C. § 2412(d).

(along with other factors) the terms of such a fee agreement. (U.S. Br. 14 (" 'a private fee agreement is but one of the many factors to be considered' ") (*quoting* syllabus in *Blanchard v. Bergeron*, 489 U.S. 87, 87 (1989)).) Elsewhere consideration of this factor seems only permissible, but not mandatory. (U.S. Br. 12 ("the fee agreement itself may be a relevant factor").) The government insists that such a contract should not "blindly" be regarded as controlling, and that consideration of factors other than such an agreement should not be limited to unusual cases. (U.S. Br. 12-13, 15, 22, 24.) But that contention is entirely consistent with giving the contractual terms themselves substantial albeit not invariably controlling weight.

In addition, the government insists that section 406(b) should be interpreted in a manner consistent with the regulations regarding awards of "reasonable" fees under 42 U.S.C. § 406(a)(1) for legal representation in the administrative process. (U.S. Br. 26-29; *see* 20 C.F.R. § 404.1725 (2001).) Under those regulations the *amount* of the benefits won in a Title II case is expressly identified as a factor that should be considered in determining the size of a fee. 20 C.F.R. § 404.1725(b) (2001).[3] This is for all practical purposes the same as considering the terms of fee agreements, since such fee agreements themselves

[3] Section 404.1725(b)(1) identifies seven factors to be considered in determining a fee award under section 406(a)(1), including "(v) [t]he results the representative achieved." 20 C.F.R. § 404.1725(b)(1) (2001). In addition, section 404.1725(b)(2), while emphasizing that the results achieved are not the sole consideration, makes clear that it is a factor of no lesser importance than the other six criteria set forth in the regulation. "Although we consider the amount of benefits, if any, that are payable, we do not base the amount of fee we authorize on the amount of the benefit *alone*, but on a consideration of *all* the factors listed in this section." 20 C.F.R. § 404.1725(b)(2) (2001) (emphasis added).

usually base the size of a fee on the amount of the benefits obtained.[4] Elsewhere in its brief, on the other hand, the government seems to insist that a court should disregard entirely the amount of benefits won. (U.S. Br. 23.)

The importance of this issue is not limited to contingent fee agreements. Some fee agreements specify the hourly rate at which the attorney (if successful) would be paid[5]; it is unclear whether under the government's standard such an agreement could or should be considered by a court in determining the hourly rate in a lodestar calculation. Nor is it apparent how under the government's proposed standard a court should treat an agreement that the attorney would work for no fee at all or a settlement of the fee issue after the case was won.

(2) May Or Should A Court Consider The Total Net Fee That A Claimant Will Pay?

In a Title II case the section 406(b) award does not by itself determine how much the claimant must pay his or her attorney. The net fee the claimant will actually pay out of his or her back benefits will also be decreased by the amount of any EAJA award, or be increased by the amount of any fee awarded for legal representation in the

[4] The regulations are somewhat more generous. The "results . . . achieved" would presumably encompass consideration of the prospective value of future Title II benefits the claimant is likely to receive as a result of the legal representation. In many cases the amount of those future benefits will substantially exceed the back benefits on which a contingent fee agreement would be based.

[5] Pet. App. 50, 64. The government mistakenly describes these affidavits as characterizing the terms of the fee agreements in this case. (U.S. Br. 5 n.5.) In fact the affidavits, executed in February and April 1999, describe Tim Wilborn's then "current" fee agreements, not the agreements made the prior year to represent the clients in the instant cases.

administrative process. These adjustments can be of substantial importance. In the instant case, because the disputed 406(b) fee awards were smaller than the EAJA awards, Gisbrecht and Sandine paid no actual fee at all. Conversely, fee awards under section 406(a)(2) are subject to a separate 25% cap (thus allowing a combined fee of up to 50%), and fee awards under section 406(a)(1) are not subject to any percentage cap at all.

Under the standard we propose a court should take into account both of these possible adjustments in determining the amount of the section 406(b) award. (Pet. Br. 32-33, 41.) On our view the range of reasonableness limiting a section 406(b) award would take into consideration how much of the awarded back benefits the claimant will actually be left with after paying any fee awards.

The meaning of the standard proposed by the government is not entirely apparent. The United States correctly focuses on the issue of whether a proposed fee would have the effect of "unduly reducing the benefits upon which [claimants] rely to meet their daily expenses." (U.S. Br. 25.)[6] Reasonableness, the government suggests, requires consideration of the " 'totality of the circumstances'." (U.S. Br. 15 (*quoting United States v. Arvizu*, 122 S. Ct. 744, 751 (2002)).) These passages seem to indicate that under the government standard a court should consider the combined net fee to be paid. Elsewhere in its brief, on the other hand, the government appears to suggest otherwise, insisting that the amount of any lodestar calculation should be treated as presumptively controlling, perhaps conclusively so. (U.S. Br. 21-23.)

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[6] The United States twice quotes with approval a statement in our opening brief that "[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants." (U.S. Br. 20, 33.)

(3) Must A Court In A Section 406(b) Case Conduct A Full Dress *Hensley v. Eckerhart*, 461 U.S. 424 (1983) Inquiry?

The small size of section 406(b) claims poses an important problem of judicial administration. Under *Hensley*, 461 U.S. 424, the courts have developed standards and procedures for examining in considerable detail, and fully airing disputes about, counsel fees under fee-shifting statutes. In cases often involving many hundreds or thousands of hours, in which an additional $25 per hour may cost the defendant tens of thousands of dollars, such an exhaustive inquiry (or at least its availability) is often entirely sensible.

Applying the same standards and procedures to section 406(b) cases often involving less than 40 hours of legal work, on the other hand, could easily make litigating section 406(b) cases prohibitively expensive. That problem is compounded by the fact that, unlike practice under fee-shifting statutes, there is apparently no way to settle a section 406(b) claim.[7]

This Court's decisions regarding fee-shifting statutes did not undertake to address this practical problem. Accordingly, it is possible to find in those opinions passages which insist on full dress *Hensley* lodestar litigation, as well as passages extolling the importance of efficient judicial administration. The United States quotes both, without explaining how they are to be reconciled in cases such as this. *Compare* U.S. Br. 9 (lodestar calculation the " 'most useful starting point' ") (*quoting Hensley* 461 U.S. at 433) *with* U.S. Br. 32 (stressing the importance of

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[7] The Social Security Administration (SSA) does not have a process for settling section 406(b) claims. The most an attorney can hope for is that, after having invested the time and expense of presenting a full dress *Hensley* fee petition, the SSA will not object to the fee petition and the court will not sua sponte reduce the fee petition.

" 'ready administrability' ") (*quoting City of Burlington v. Dague*, 505 U.S. 557, 564 (1992)).

Under the standard we propose, the precise and often fiercely litigated *Hensley* calculation would be unnecessary if the court concluded that the fee requested was reasonable. The threshold reasonableness determination would itself be relatively simple. The district judge who had decided the merits of the claim would already be sufficiently familiar with the legal work done to be able to decide whether the fee requested was excessive. The judge would invariably know if there had been an EAJA award or undue delay, and there would not often be a significant dispute about the availability or likely size of any additional fee for representation in the administrative process.

In a Title II case, legal representation is usually limited to a summary judgment motion and supporting memoranda, all of which the district court would already have seen. A court's rough assessment of the amount of work needed to prepare these documents would be sufficient, since a precise lodestar calculation would not be necessary. Similarly, a judge's general knowledge of the local hourly rates would suffice, without need for affidavits or rate studies.

III. SECTION 406(b) DOES NOT REQUIRE A COURT TO DETERMINE WHAT COUNSEL FEE WOULD BE "THE *MOST* REASONABLE FEE"

The parties characterize in remarkably similar terms the purpose of section 406(b). The statute was enacted, they agree, to protect claimants from fees that were "inordinately large,"[8] excessive,[9] and or "abusive."[10] The parties disagree about how Congress intended to solve that

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[8] *Compare* U.S. Br. 21, 32 *with* Pet. Br. 9, 15, 19, 23.

[9] *Compare* U.S. Br. 22, 24 *with* Pet. Br. 14, 15.

[10] *Compare* U.S. Br. 9, and Br. Resp't Opp'n 16, *with* Pet. Br. 16.

problem. The government insists that section 406(b) directs federal judges in each case to determine with precision the "fee the court deems *the most reasonable*." (U.S. Br. 13 (emphasis added).)[11] On our view the courts have an important but more modest role. A federal judge should scrutinize a fee request to assure that the amount is not abusive or otherwise unreasonable; absent such a problem, however, the court would at least ordinarily approve whatever fee the claimant and attorney had agreed upon.

The government objects that under our standard a court would only disapprove a fee request if it were "abusive." (U.S. Br. 12, 15.) But only a few pages earlier in its brief the government describes prevention of "abusive" fees as the very purpose of the statute. (U.S. Br. 9.) That our proposed standard conforms to the congressional purpose is assuredly its very virtue. Similarly, the government at pages 22 and 24 of its brief asserts (correctly) that the purpose of the statute was to prevent "excessive" fees; then on page 25 of the same brief the United States objects that our standard only calls for disapproving fees where they are "excessive." If there is a difference between the government's characterization of the purpose of the statute, and its characterization of our proposed interpretation of that statute, that distinction is surely an elusive one.

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[11] *Hensley* and its progeny do not characterize the fee calculation method they establish as identifying "the most reasonable" fee. And they do not purport to address how to resolve the unique fee issues that arise under section 406(b). In this case, for example, Gisbrecht's attorneys won for him a total of $28,366 in past-due benefits, and under the contract entered into between Gisbrecht and the attorneys Gisbrecht had agreed to terms under which he would pay a fee of $7,091.50. *Hensley* does not hold that in such a case "the most reasonable" fee for Gisbrecht to pay is *nothing*.

The government also objects that if judges under section 406(b) can only reject a fee request because the amount is abusive or excessive, instances in which judges disapprove such fee applications will be "rare", "unusual", "infrequent", and "exceptional." (U.S. Br. 12, 15, 16, 20.) For our part we offer no prediction regarding how often disapproval would occur; the circumstances of these cases vary too widely to permit such a forecast. But the thrust of the government's argument remains obscure. Given the statutory purpose of preventing abusive fees, if abusive fees are today (or should in the future become) uncommon, then disapprovals *should* be equally infrequent.

The statutory language places two and only two limitations on a section 406(b) fee – it must be reasonable and it must not exceed 25% of back benefits. Nothing in the text or legislative history of the statute suggests that Congress intended to create yet a third unspoken limitation (that the parties can only agree upon "the most reasonable fee") on the ability of Title II claimants' "freedom to contract with their attorneys." *Venegas*, 495 U.S. at 87.

The government asserts that fee agreements in Title II cases should always be disregarded by the courts because they invariably are the unfair result of grossly unequal bargaining power. (U.S. Br. 20, 31 n.17.) In the past, however, the government has insisted to the contrary that section 406(b) was not enacted to work a wholesale invalidation of all fee agreements in Title II cases.[12]

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[12] U.S. Dep't of Health and Human Servs., Report to Congress: Attorney Fees Under Title II of the Social Security Act, 66 (1988) ("The 1965 Amendments were not designed to prohibit or discourage attorneys and claimants from entering into contingent fee agreements. The Amendments were designed to control the charging of 'inordinately large fees' in court cases and to assure attorneys that they would receive appropriate fees for representing claimants.").

Although the Congress which enacted section 406(b) objected to contingent fee agreements providing for a fee of 50% of the award, such agreements were not the result of some special inability of Title II claimants to negotiate more favorable arrangements. To the contrary, at the time when section 406(b) was adopted, 50% fee agreements were a widespread phenomenon in many areas of litigation, and section 406(b) was part of a general movement to lower that rate.[13] The fact that today most Title II fee agreements call for a 25% fee does not indicate some lack of bargaining power on the part of claimants. Because the generally prevailing rate for contingent fee representation is 33%[14], the section 406(b) 25% standard is a form of price control; Title II fee agreements are generally at that level because, in a free market, they would like other agreements be higher. If section 406(b) capped fee agreements at a mere 1%, fee agreements would also use that statutory ceiling.

The government objects that if Congress had intended only to assure that fees were non-abusive, it was "odd" that Congress framed the statute as a requirement that the fee be "reasonable." (U.S. Br. 24.) But as we explained in our opening brief, "reasonable" was the very term that the courts and bar associations used in 1965 (and today) to distinguish non-abusive fees from fees that are excessive. (Pet. Br. 17.)

The government suggests that if Congress intended only to direct judges to reject excessive fees, it would

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[13] F.B. MacKinnon, Contingent Fees for Legal Services, 160-65 (1964).

[14] *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998); *In re: Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992); H. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L.Rev. 267, 285-86 (1998).

have utilized language similar to that then found in section 406(a), which in 1965 provided that the agency "may, by rule and regulation, prescribe the maximum fees which may be charged" for services in the administrative process. (U.S. Br. 16 (emphasis omitted).) But this (now repealed) provision in section 406(a) had a meaning entirely different from the traditional common law limitation on excessive fees. This language in section 406(a) authorized the agency to establish a fixed fee schedule; the regulations in effect in 1965 under section 406(a) limited fees to $20 for work done before the (then) Bureau and $30 for representation before a hearing examiner and the Appeals Council. 20 C.F.R. § 404.976 (1961). These ceilings were entirely unrelated to the amount of work an attorney might have devoted to a particular case. Against that background, Congress in framing statutory language to limit abusive fees would not have used the phrase "maximum fees," words which would have been understood to envision a fixed fee structure barring non-abusive fees as well. To the contrary, given the legal context of the time, "reasonable" was precisely the appropriate term of art.

In the alternative, the government relies on the current language of section 406(a)(2)-(3). That provision, it notes, contains an express statutory presumption requiring use of a fee agreement; thus, the more general language of section 406(b), it insists, cannot be construed to include the same presumption. (U.S. Br. 26-29.) This argument, however, is directed at refuting a position which we have not advanced. Section 406(a)(2) illustrates what would constitute a binding presumption. The SSA is generally *required* by section 406(a)(2) to award whatever fee is authorized by a fee agreement (subject to the statutory caps); an objector who opposes implementation of the agreement bears the burden of proof, and must demonstrate that the fee would be "clearly excessive." 42 U.S.C. § 406(a)(3)(A). But we do not urge that section 406(b)

should be construed to create such a presumption, or to shift to the SSA the burden of demonstrating the unreasonableness of a fee request. To the contrary, we agree that under section 406(b), unlike section 406(a)(2), the burden of establishing reasonableness is on the attorney seeking the fee.

The government objects that if a fee award is based (perhaps even in part) on a contingent fee agreement, attorneys who provided identical services may receive substantially different fees. But the government's own section 406(a)(1) regulations, which base fee awards in part on the amount of back benefits obtained, mandate just such a disparity. The 25% cap in section 406(b) will also dictate that lawyers subject to the cap will receive smaller fees than lawyers who provided the same services but who avoided the limitation because their clients happened to receive larger back benefits. Attorneys who provide identical services will receive dramatically different fees if only one of the cases is successful. Most importantly, if – as the government acknowledges – the overarching focus of section 406(b) is on how much of the awarded benefits will actually be received by a claimant, then what matters is not whether lawyers who perform comparable services get identical fees, but whether claimants awarded similar benefits actually receive comparable post-fee payments.

The government properly expresses concern that attorneys not be permitted to increase their fees by resorting to delaying tactics.[15] (U.S. Br. 24.) But there is no claim that that occurred in these cases. To the contrary, the claimants' attorneys required an average of only 58 days per case to prepare and file their main and reply briefs on the merits. (*See* Appendix to Reply Br. for the Pet.) Delays for which the SSA was responsible were far longer; the administrative proceedings which preceded

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[15] The 25% cap has the same potential to reward delay.

the litigation averaged 1,357 days. (*Id.*) Further, in any case in which a claimant's attorney is responsible for undue delay, a court is perfectly competent to reduce the fee accordingly.

The language of section 406(b) authorizing a judge to "determine" a reasonable fee does not by itself provide guidance regarding *how* that determination is to be made. The fact that a judge in making such a determination may look to the terms of a fee agreement (a consideration the government may or may not actually object to) does not mean that the judge him- or herself is not making the ultimate decision. Even under the lodestar method, decisions made earlier by attorneys – to devote more or fewer hours in a case, to develop a particular legal or factual argument, to allocate work among partners, associates and paralegals[16] – will often be of controlling importance to the judge's fee calculation. Congress's decision to require that the fee awarded be "reasonable" does not mean that Congress believed that fee requests could be ranked in order of increasing reasonableness, or that it wanted the judge to pick the "most reasonable" fee. The rule that only men can play on a men's table tennis team does not mean that coaches are supposed to select the most manly team applicants.

The government does not contend that the fees requested in the instant case were abusive or otherwise unreasonable. Indeed, the government has not asserted that it would have been an abuse of discretion for the district courts to have awarded larger fees, even as large as the fees requested. Nothing in the text or legislative history of section 406(b) suggests that Congress intended

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[16] *E.g., Blumenthal v. G-K-G Inc.*, No. 1:89CV8693, 1993 WL 414686 at *3 (N.D.Ill. Oct. 15, 1993) ("Moreover, even if R & W's staffing choices were somewhat unorthodox, this court is reluctant to second guess its decisions absent a stronger showing of abuse").

in such circumstances to substitute the discretion of a federal judge, however wise and experienced, for the contractual agreement between the attorney and client, or to compel the attorney (without possibility of recompense) to expend substantial time, effort, and expense to elicit an exercise of that discretion.

IV. ENHANCEMENT OF FEE AWARDS UNDER SECTION 406(b) IS NOT PRECLUDED BY THIS COURT'S DECISION IN *CITY OF BURLINGTON V. DAGUE*, 505 U.S. 557 (1992)

Determination of whether contingency enhancement is appropriate under section 406(b) requires this Court to resolve which of two distinct lines of cases should control. As we noted in our opening brief, and the United States does not dispute, it was well established in 1965 that a court required (by the absence of a determinative fee agreement) to decide the value of legal services provided by an attorney to his or her own client would award a larger fee if payment was contingent on the success of the litigation. (Pet. Br. 42-43.) On the other hand, under fee-shifting statutes contingency enhancement is not authorized. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

The common law rule provides the more appropriate precedent for construing section 406(b). *Dague*, like this Court's other fee-shifting cases, "did not address contractual obligations of plaintiffs to their attorneys; it dealt only with what the losing defendant must pay the plaintiff." *Venegas*, 495 U.S. at 89. In *Dague* the United States argued that enhancement was inappropriate precisely *because* the fee in that case was to be paid by the defendant rather than by the attorney's own client.[17] *Dague*

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[17] Br. for the U.S., No. 91-810, 20 n.19 ("Contingency fees are typically used in private tort law, where the fee is paid out of the successful plaintiff's damage award. In that context, it is at

itself recognized that lawyers reasonably charge their clients more in cases where the client agrees to pay only if he or she prevails. *Dague*, 505 U.S. at 565-66. The United States does not suggest that there is anything inherently unfair or abusive about such fee agreements.[18]

If Mr. Gisbrecht had retained attorney Wilborn in connection with any other litigation, Gisbrecht would undoubtedly have had to agree to a higher fee level if he refused to pay any fee at all if the case were lost. In the instant case it is federal law that precluded Wilborn from charging or even accepting any fee from Gisbrecht if the litigation did not result in an award of benefits. But the higher fee that would normally result from such a restriction is no less reasonable because the restriction comes from the government. In both cases the additional consideration received by the client – exemption from any fee obligation if the case is unsuccessful – is the same, and supports the reasonableness of the additional consideration – contingency enhancement – received by the attorney.

Dague declined to permit contingency enhancement under fee-shifting statutes because such enhancements would result in a hybrid fee arrangement distorted to favor one party. *Dague*, 505 U.S. at 566. The government

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least roughly equitable to tie the attorney's fee to the size of the damage award obtained through his efforts. . . . The rationale applicable to the situation in which the fee is paid out of the recovery obtained by the plaintiff is simply inapplicable where there is no such fund, and the award is paid directly by the defendant."); Transcript of Oral Argument, *City of Burlington v. Dague*, 1992 WL 687821 at *19-*20, *24-*26.

[18] *See also* C. Silver, Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There From Here, 74 Tul.L.Rev. 1809, 1826 (2000) ($35 million contingent fee agreement made by Cravath, Swaine & Moore, payable only if proposed corporate merger was successful).

proposes to construe section 406(b) to concoct a hybrid scheme with the same vice. The statutory 25% cap builds the contingent-fee model into the statute itself, codifying the very principle rejected for fee-shifting statutes by *City of Riverside v. Rivera*, 477 U.S. 561 (1986). On the government's view, however, that same contingency-fee model should be disregarded in determining what fee should be awarded at or below the cap. The result would be that in Title II cases the contingent-fee model would be resorted to only to reduce, but not to increase, the fee award. If such one-sidedness was inappropriate in *Dague*, it is equally inappropriate here.

The government invokes the pivotal reasoning in *Dague* that under fee-shifting statutes a contingency enhancement " 'would likely duplicate' " factors already subsumed in the lodestar, since cases with a greater risk of loss would often be cases in which the greater difficulty would by itself warrant a higher fee. (U.S. Br. 31 (*quoting Dague*, 505 U.S. at 562).) "Taking account of it again through lodestar enhancement amounts to double counting." *Dague*, 505 U.S. at 563. Only two pages later in its brief, however, the government apparently maintains that Title II cases will rarely if ever involve the sort of complex legal or factual issues that would warrant the higher lodestar (and thus the risk of double counting) invoked in *Dague*. (U.S. Br. at 33.)

As we explained in our opening brief, paying an attorney $150 an hour while limiting payment to the one-third of Title II cases that are typically won means that on average an attorney who takes such cases will over time actually receive only $50 an hour. The government does not dispute that fact, but insists a lower hourly rate is appropriate because in its view Title II cases are comparatively simple. (U.S. Br. 33.) But this is double counting (or, more accurately, double subtracting) with a vengeance. If a given Title II case is relatively easy, that should already result in a lower lodestar figure. The very same reason

cannot then fairly be invoked to further reduce the average fee by two-thirds.

There is evidence indicating that the low level of fees in Title II litigation has a pronounced impact on the availability of counsel. In the administrative process, where the terms of contingent fee agreements generally control because of section 406(b)(2), losing parties almost invariably appeal to the next level of review. Of the claimants who lose before ALJs, over 90% appeal to the Appeals Council.[19] But of applicants whose claims are denied by the Appeals Council, less than 15% seek review in federal court.[20] This disparity exists even though claimants have a far higher chance of success in federal court than they do at the Appeals Council.[21] That disparity necessarily reflects the reluctance of attorneys who represented Title II claimants in the administrative process to continue to do so in federal court; the claimants themselves would assuredly have wanted to challenge an adverse Appeals Council decision if legal representation had still been available.

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[19] In Fiscal Year 2000, there were 125,739 denials by ALJs, and 122,780 appeals decided by the Appeals Council. Social Security Advisory Board, Disability Decision Making: Data and Materials (2001) (Disability Data), 86, *available at* http://www.ssab.gov/chartbookB.pdf. (Although this data includes both Title II and SSI claims, the former outnumber the latter.) In three-quarters of Title II claims tried before ALJs the claimants are represented by counsel. Social Security's Processing of Attorney Fees: Hearing Before the Subcommittee on Social Security of the House Committee on Ways and Means, 107th Cong., 1st Sess., 21-22 (2001) (statement of Barbara Bovbjerg, U.S. General Accounting Office).

[20] In FY 2000 there were 90,857 denials by the Appeals council, and 12,011 federal court decisions. Disability Data, 86.

[21] In FY 2000 the Appeals Council denied or dismissed 76% of all claims, while federal courts denied or dismissed only 45% of the claims they heard. Disability Data, 86.

No less importantly, an interpretation of section 406(b) which limits fees to a lodestar calculation without any contingency enhancement is likely to affect adversely the quality of representation available to Title II claimants. If attorneys with a Title II practice can receive on average only $50 an hour (one-third of the $150 median hourly rate in Portland),[22] lawyers skilled enough to bill $100 or $150 an hour from some other form of practice will not ordinarily take Title II cases. Attorneys who can attract clients paying $150 per hour will be unlikely to handle Title II litigation except where they can identify claims whose chance of success is far above the 35% national average. An attorney's legal skills, of course, do not invariably correlate with the hourly rate he or she can command. But a system which limits most Title II cases to lawyers unable to earn more than one-third the hourly rate of their peers would "depriv[e] a plaintiff of the option of promising to pay more . . . if that is necessary to secure counsel of their choice" and would thus frustrate the goal "of enabling plaintiffs . . . to secure competent counsel." *Venegas*, 495 U.S. at 89-90.

The decision in *Dague* rested in part on the difficulty of determining how much a fee shifting award should be enhanced because of the element of contingency. 505 U.S. at 566. But where, as here, the fee is to be paid by the attorney's own client, the existence of a contingent fee agreement provides a ready solution. The use of contingent fee agreements – or, more precisely, the fact that a fee paid under such an agreement often exceeds what would have been charged on a non-contingent basis – has traditionally been justified by the contingency risk. Under contingent fee agreements that difference is accepted precisely because it is a form of contingency

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[22] Flikirs Prof'l Servs., Oregon State Bar: 1998 Economic Survey (Oct. 1998), 31 (Pet'r App. 92).

enhancement.[23] The amount of that enhancement is governed, not by some percentage calculation, but by the percentage cap on the fee contained in the agreement itself. So long as the attorney can persuade the court that the resulting fee is not abusive or otherwise unreasonable, the contingency enhancement inherent in the fee agreement is the appropriate enhancement under section 406(b).

Respectfully submitted,

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March 2002

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[23] F.B. MacKinnon, Contingent Fees for Legal Services: A Study of Professional Economics and Responsibilities, 159 (1964).

APPENDIX TO REPLY BRIEF FOR PETITIONERS

Length of Administrative Proceedings

	Petitioner		
	Gisbrecht	Miller	Sandine
Application	1/27/94	2/23/93 & 3/16/93	7/27/93
ALJ decision	9/27/96	3/7/95	4/18/96
Appeals Council denial	3/18/98	4/19/96	6/4/97
Total Days to Exhaust Administrative Remedies	1,511 (4.14 years)	1,151 (3.15 years)	1,408 (3.86 years)

App. 2

Length of Merits Judicial Proceedings

Petitioner Gisbrecht

Events	Dates	Waiting for plaintiff (days)	Waiting for defendant or court (days)
complaint until answer	4/6/98 7/13/98		98
answer until plaintiff's merits brief	7/13/98 8/14/98	32	
plaintiff's merits until order of settlement	8/14/98 10/16/98		63
Total		32	161

App. 3

Petitioner Miller

Events	Dates	Waiting for plaintiff (days)	Waiting for defendant or court (days)
complaint until answer	6/17/96 9/4/96		78
answer until plaintiff's merits brief	9/4/96 11/14/96	71	
plaintiff's merits brief until defendant's motion to remand	11/14/96 1/6/97		53
defendant's motion to remand until plaintiff's opposition to motion to remand	1/6/97 2/6/97	31	
plaintiff's opposition until defendant's reply	2/6/97 2/21/97		15
defendant's reply until judgment	2/21/97 10/7/97		228
Total		102	374

Petitioner Sandine

Events	Dates	Waiting for plaintiff (days)	Waiting for defendant or court (days)
complaint until answer	7/30/87 10/24/97		86
answer until plaintiff's merits brief	10/24/97 11/25/97	32	
plaintiff's merits brief until defendant's merits brief	11/25/97 1/5/98		41
defendant's merits brief until plaintiff's reply brief	1/5/98 1/13/98	8	
plaintiff's reply brief until judgment	1/13/98 4/13/98		90
Total		40	217

Supreme Court, U.S.
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No. 01-131

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GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, AND DONALD L. ANDERSON,
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JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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VS.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY,
Respondent.

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of *amicus curiae* briefs have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury, vindication of civil rights protected under federal and state statutes, and in other actions seeking legal redress.

ATLA's members are most commonly retained by their clients on a contingent fee basis. They know first-hand the role played by contingent fee agreements as a "key to the courthouse," affording access to justice for many Americans. They also know from experience that contingent fee financing provides a strong incentive for attorneys to accept meritorious cases and pursue them zealously and efficiently.

In view of this experience, ATLA is confident that this brief as *amicus curiae* will assist the Court in addressing the questions presented in this case.

SUMMARY OF THE ARGUMENT

1. When a claimant seeking social security benefits prevails in district court, 42 U.S.C. § 406(b) requires the court to determine "a reasonable fee" to be paid by the claimant to his or her attorney. Where the client has retained the attorney on a contingent fee basis, that fee should be regarded by the court as presumptively reasonable.

The lower court erred in ruling that the statute requires the district court to disregard the agreement and substitute its own calculation of a reasonable fee using the "lodestar" method. The text and legislative history of the statute indicate that Congress expected that claimants would continue to obtain

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a monetary contribution to the preparation or submission of this brief.

representation on a contingent fee basis and added protections for those claimants.

This Court's strong preference for use of the lodestar method under fee-shifting statutes should not extend to fees paid by clients to their own attorneys. The lodestar method provides a means of approximating the market value of legal services in circumstances where market forces cannot be relied upon to further the purposes of the statute. Where a market actually exists, there is no reason to substitute an approximation of a market price for the real thing.

2. Contingency fee agreements have long played an important role in the marketplace for legal services. Their use extends far beyond personal injury and tort law. Indeed, contingency fee financing has become the dominant means by which individuals and small businesses obtain legal representation involving monetary claims.

Contingency fee arrangements have become widely used because they serve important functions in the marketplace. They provide access to legal services to many individuals who could not otherwise pay for them. They assure that the economic interests of attorneys are aligned with those of their clients. They foster efficient use of resources by attorneys. And they are easily enforced without the need of secondary litigation.

3. By contrast, hourly billing, which was not widely used until the early 1960's, gives lawyers the incentive to maximize the time spent on legal matters, not the results. The emphasis on billable hours has led to scandalous defrauding of clients and an epidemic of padded billing.

The lodestar method places the perverse incentives inherent in hourly billing in the laps of the district courts. Judges have expressed dissatisfaction with the results of the lodestar method and the amount of judicial effort required to resolve fee petitions.

ARGUMENT

I. NEITHER THE TEXT OF 42 U.S.C. § 406(b) NOR THIS COURT'S ENDORSEMENT OF THE LODESTAR METHOD UNDER FEE-SHIFTING STATUTES SUPPORTS THE USE OF THE LODESTAR METHOD TO DETERMINE THE REASONABLENESS OF FEES PAID BY CLAIMANTS UNDER §406(b).

A. The Text and Legislative History Support the Courts' Treatment of Contingent Fee Agreements Between Claimant and Attorneys As Presumptively Reasonable.

In a departure from the prevailing American rule, certain federal statutes provide for a reasonable attorney's fee to be paid to the prevailing party in a civil action by the opposing party. To determine a reasonable fee under such fee-shifting statutes, this Court has stated that there is a "strong presumption" in favor of the "lodestar" formula -- a reasonable hourly rate multiplied by the number of hours reasonably expended. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (Clean Air Act, 42 U.S.C. §7604(d)). *See also Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) (Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988), and *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (42 U.S.C. § 1988).

This case presents the question of whether that presumption that the lodestar method results in a reasonable fee is appropriate in cases where the court is called upon to determine a reasonable fee to be paid by the client to his or her own attorney. The court below disregarded the agreed-upon contingent fee arrangements between the clients and their attorneys. The court ruled that the district court properly made its own calculation of the fee to be paid to the attorney

by his client, using the lodestar method. *Gisbrecht v. Apfel*, 238 F.3d 1196, 1198 (2001).

In ATLA's view, the lodestar model is useful in those circumstances under fee-shifting statutes where market forces cannot be relied on to set a reasonable fee. In this case, such a private market was operating. The lower court erroneously substituted a proxy for the market value of the attorneys' services in place of the real thing.

The clients in these consolidated cases believed – correctly, as it turned out – that they were wrongfully denied Social Security disability benefits. They retained counsel to pursue their claims and agreed that, if successful, they would pay the attorneys a fee equal to 25% of the back benefits awarded. The court rejected the Petitioners' evidence that these agreements reflected the market rate for legal representation of social security claimants. 238 F.3d at 1198. Rather, the court held, to determine "a reasonable fee" under 42 U.S.C. § 406(b), "a district court must set a reasonable lodestar rate for counsel's services," which is "a reasonable *hourly* rate." Id. (emphasis by the court).

Congress enacted the Social Security Act in 1935 to provide a safety net to protect wage earners and their families from impoverishment due to old age, death, and disability. The Act also created the Social Security Administration to administer these programs. Congress made no provision at that time regarding the costs of legal representation of claimants disputing the Administrator's denial of benefits in district court. Typically, attorneys typically represent claimants on the basis of contingent fee agreements.

In 1965, Congress acted to address a specific problem relating to those agreements. The Senate Finance Committee explained:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in

> Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins the case.

S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1 at 122, reprinted in 1965 U.S. Code Cong. & Admin. News 305, 2062 (1965).

The lawmakers' response was not to prohibit contingent fees. Instead, Congress added § 406(b) to Title II of the Act to protect claimants against abuses. That section provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

42 U.S.C. § 406(b).

The statutory text is framed in terms of contingent fees, making the attorney's fee conditional on a judgment favorable to the claimant and imposing a ceiling on the percentage of past-due benefits that the attorney may charge. Congress clearly expected that claimants would continue to obtain the services of attorneys on a contingent fee basis. By requiring federal courts to determine that such fees are reasonable, Congress simply adopted the familiar approach universally employed by state courts. State courts have long

exercised their authority to invalidate contingent fee agreements which were obtained improperly or which result in an excessive fee. *See* 1 Stuart M. Speiser, Attorneys' Fees 2.9 & 2.10 (1973).

Nothing suggests that Congress intended courts to determine "a reasonable fee" based on the number of hours devoted by the attorney to the case. The lodestar method itself was not devised until the Third Circuit's decision in *Lindy Bros. Builders v. American Radiator & Standard Sanitation Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). Indeed, billing clients by the hour was still a very new innovation in 1965, used by only a few large law firms engaged in corporate work. *See* Part III, below. It is quite unlikely that Congress would have intended, without any comment, such a drastic departure from prevailing practice based on this novel method of charging clients.

The Courts of Appeals of the Second, Sixth and Seventh Circuits have concluded that the statute permits courts to treat a contingent fee agreement between a claimant and counsel as presumptively reasonable. *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990); *Rodriquez v. Bowen*, 865 F.2d 739, 746 (6th Cir. 1989); *McGuire v. Sullivan*, 873 F.2d 974, 981 (7th Cir. 1989). Those courts take the amount of the fee due under the contract as a starting point. *See Wells*, 907 F.2d at 371 ("the best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client"); *Rodriquez*, 865 F.2d at 746 (stating that the agreement between the client and attorney "should be given the weight ordinarily accorded a rebuttable presumption.").

Under this approach, the courts are not bound to accept the agreed upon fee as reasonable per se. The courts review the circumstances surrounding the contingency agreement carefully to determine whether there are any factors which would render the agreement unreasonable. *Rodriguez* at 746; *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d

at 980-81. The court will reduce a fee that is the product of the attorney's own misconduct or incompetence, such as where the attorney's improper conduct has resulted in undue delay. In addition, reduction is appropriate where counsel would otherwise receive a "windfall" because the benefit award turns out to be unusually large or the amount of work required turns out to be minimal. *Rodriquez*, 865 F.2d at 746-47.

ATLA submits that this approach is most consistent with the language and intent of 42 U.S.C. § 406(b). It gives effect to contracts for legal services shaped by market forces, while affording clients the same degree of protection they have traditionally enjoyed under state law against abusive or excessive contingent fees.

B. This Court's Endorsement of the Lodestar Method in Fee Shifting Cases Does Not Support the Use of the Lodestar Method in Place of Contingent Fee Agreement.

The Ninth Circuit, in its short opinion in this case and in its earlier decisions specifically rejected this approach. 238 F.3d at 1198 n.2. In those prior decisions, the court relied heavily on this Court's approval of the lodestar method in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). *See Allen v. Shalala,* 48 F.3d 456, 458-59 (9th Cir. 1995). Other courts of appeals have reached similar conclusions, also in reliance on this Court's endorsement of the lodestar model. *See Craig v. Secretary, Dep't of Health & Human Services.,* 864 F.2d 324, 327 (4th Cir. 1989); *Brown v. Sullivan,* 917 F.2d 189, 192 (5th Cir. 1990); and *Cotter v. Bowen,* 879 F.2d 359, 363 (8th Cir. 1989).

This reliance, ATLA submits, is misplaced.

In *Hensley*, this Court addressed the problem of evaluating fee petitions under the Civil Rights Attorney's

Fees Awards Act, 42 U.S.C. § 1988. In such cases, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. Indeed, this Court has stated that there is a "strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a 'reasonable fee' is wholly consistent with the rationale behind the usual fee-shifting statute." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986). See also *City of Burlington v. Dague,* 505 U.S. 557, 563 (1992) ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee.")

However, this Court has made it clear that its use of the lodestar method in fee-shifting cases is necessary because the usual market forces that determine the value of legal services cannot be relied upon. As Justice O'Connor noted, "The private market commonly compensates for contingency through arrangements in which the attorney receives a percentage of the damages awarded to the plaintiff. In most fee-shifting cases, however, the private market model of contingency compensation will provide very little guidance." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731 (1987) (O'Connor, J., concurring). See also *Coup v. Heckler*, 834 F.2d 313, 324 (3d Cir. 1987) (because the fees sought under § 406 are paid by the client, rather than by the defendant, "the concerns which motivated the plurality in *Delaware Valley* are not implicated at all.").

This is true for several reasons. Most importantly, when federal statute shifts the fee obligation from the client to the opposing party, the customer is not bargaining with his or her own money and lacks the incentive to keep costs reasonable. In the absence of market forces, the district court must provide those curbs.

In addition, "[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Riverside v. Rivera,* 477 U.S. 561, 574 (1986). As Justice Scalia observed in *City of Burlington v. Dague*, 505 U.S. 557, 564 (1992), "for a very large proportion of contingency-fee cases--those seeking not monetary damages but injunctive or other equitable relief--there is no 'market treatment.' Such cases scarcely exist, except to the extent Congress has created an artificial 'market' for them by fee shifting." Nevertheless, Congress intended "to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief." *Blanchard v. Bergeron*, 489 U.S. 87 (1989). The lodestar method serves this special purpose.

Finally, as Congress has also recognized, particularly in civil rights cases, the benefits obtained by counsel are not limited to the particular litigant but extend to society at-large. *Blanchard v. Bergeron,* 489 U.S. 87, 96 (1989). For this reason, courts may under a fee-shifting statute approve a fee that the market place would reject. *See, e.g., Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (approving $160,000 fee for attorney services in a gender discrimination suit resulting in an award of $33,000 in damages and injunctive relief).

In sum, this Court has endorsed the use of the lodestar method as a proxy for market forces in those situations where no real market exists which serves the statutory purpose. As other circuits have recognized, this does not preclude the use of a contingent fee agreement as presumptively reasonable in social security benefits cases, where a private market for legal services actually exists. *Rodriquez v. Bowen*, 865 F.2d 739, 745-46 (6th Cir. 1989) (en banc); *Wells v. Bowen*, 855 F.2d 37, 44-46 (2d Cir. 1988); *Coup v. Heckler*, 834 F.2d 313, 324 (3d Cir. 1987)

II. A CONTINGENCY FEE AGREEMENT REFLECTS THE MARKET VALUE OF LEGAL SERVICES AND IS PRESUMPTIVELY REASONABLE

A. Contingency Fee Agreements Play an Important Role in the Market for Legal Services.

ATLA has long championed the use of contingency fee arrangements to purchase legal services. However, ATLA also recognizes that such agreements have been highly controversial and that this controversy may affect the decision whether such agreements should serve as the starting point for determining "a reasonable fee" under 42 U.S.C. §406. It is worthwhile, therefore, to examine the role contingency fees play in the marketplace for legal services in America.

At other times and in other places, lawyers (ostensibly) did not charge for their services. An English barrister, William Forsythe, wrote in 1849:

> From the very earliest times, and in every country where advocacy has been known, it has been the custom to look upon the exertions of the advocate as given gratuitously, and the reward which the client bestows as purely honorary, in discharge not of legal obligation, but a mere debt of gratitude.

Quoted in Furlonger, Time for Business-Lawyers to Stop Billing Time?, Beyond the Billable Hour: An Anthology of Alternative Billing Methods 93 (R. Reed ed. 1989).

At one time, the Roman Republic banned legal fees; the honor of being a successful advocate was deemed its own reward. However, as Roman law developed in complexity, lawyers were able to obtain a customary gratuity, unenforceable against the client. There was a time when English barristers would meet their clients at the pillars in St. Paul's and around Doctors' Commons where the client

customarily placed an honorarium in a purse that hung at the back of the advocate's gown as the barrister looked away. Elizabeth A. Kovachevich and Geri L. Waksler, *The Legal Profession: Edging Closer To Death With Each Passing Hour*, 20 Stetson L. Rev. 419, 420 (1991).

The American civil justice system recognizes that access to justice depends upon the broad availability of legal representation. The compensation of attorneys is part of the price of liberty under the rule of law. Generally, the clients of attorneys pay that price. The American rule is that, unless a statute provides otherwise, parties in civil litigation are responsible for their own legal costs. *Alyeska Pipeline Services. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-50 (1975). The result is a marketplace in which clients as customers purchase legal services. This Court has consistently encouraged the free operation of that marketplace. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)(striking down minimum fee schedules); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising); *Peel v. Attorney Registration and Disciplinary Comm.*, 496 U.S. 91 (1990) (attorney commercial speech regarding specialization).

For most of our history, Americans have purchased the services of attorneys in one of two ways. An attorney and client might agree upon a fixed fee for a specified service. Such arrangements remain in common use for relatively simple and predictable legal services, such as preparing a will or handling a real estate settlement.

From very early in our country's history, Americans seeking monetary damages have also retained lawyers on a contingency basis, agreeing to pay the attorney only if the claim is successful in an amount measured by a percentage of the recovery. Pennsylvania's Justice Brackenridge observed in 1814 the practice of attorneys "taking what are called contingent fees." Despite some prohibitions against this

practice, "at an early period, it was tolerated, and has become common." H.H. Brackenridge, in LAW MISCELLANIES xx (Stanley Katz et al. eds., 1972) (1814). As early as 1786, a Massachusetts pamphleteer railed against this "pernicious practice," by which people "give one quarter part of their property to secure the remainder, when they appeal to the laws of their country." Honestus [pseud. of Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston, 1819), reprinted in 13 Am. J. Legal Hist. 241, 256 (1969).

Despite that, contingency fee arrangements became increasingly popular with clients in early America. They included merchants and creditors, the heirs of millionaires and Revolutionary War veterans, American diplomats and Indian tribes. Their lawyers included such accomplished litigators as Henry Clay and Daniel Webster. Contingency fee contracts also provided representation to settlers and claimants with conflicting land grants and titles in newly-settled states. *See* Peter Karsten, *Enabling The Poor To Have Their Day In Court: The Sanctioning Of Contingency Fee Contracts*, A History To 1940, 47 DePaul Law Review 231, 237-38 (1998) (citing cases).

Following the Civil War, Americans retained counsel on a contingency fee basis to represent them in a wide variety of legal disputes, including minority stockholder suits against corporations, depositor suits against banks, creditors and merchants pressing claims against railroads, other companies or the government. Even government entities suing other government entities over tax revenues retained contingent fee lawyers. Those lawyers included some of the most respected members of the bar. Karsten, *supra* at 248. "Moreover, when challenged in court, virtually all of these contracts were indeed deemed to be valid and binding." *Id.* at 249.

This Court added its approval, even for claims against the federal government. *Ball v. Halsell*, 161 U.S. 72 (1896), involved a statute allowing the Court of Claims to adjudicate

claims arising out of Indian depredations. Congress permitted a contingent fee of up to 20% to be paid out of the sum collected. The Court stated:

> By several decisions of this court,--indeed, beginning at December term, 1853,--contracts for contingent fees, by which attorneys, employed to prosecute claims against the United States, were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid.

Id. at 80. In *Stanton v. Embrey*, 93 U.S. 548 (1876), the Court upheld claims for attorney fees for prosecuting claims against the U.S. following the Civil War. The Court noted that attorneys "usually charged contingent fees of from twenty to twenty-five per cent, which the plaintiff's witnesses regarded as a reasonable charge." The Court rejected the argument that such fees are improper, stating it was "beyond legitimate controversy" that such contracts are to be enforced "if they are free from any taint of fraud, misrepresentation, or unfairness." *Id.* at 556-57.

Contingent fees are perhaps most closely identified with personal injury lawsuits. As tort law developed to deal with the carnage of negligently inflicted injuries and deaths that accompanied the Industrial Revolution, the contingent fee offered workers and their families their only means of obtaining compensation.

As Pennsylvania Justice Michael A. Musmanno famously declared:

> If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on his part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionable meager sum in settlement or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a victimization of the weak by the mighty.

Richette v. Solomon, 187 A.2d 910, 919 (Pa. 1963).

Today, contingent fee financing is not only the near-universal choice of plaintiffs in personal injury and other tort actions, but is commonly used "in collection suits, shareholder derivative suits, antitrust suits for damages, tax cases, will contests, and condemnation proceedings," Richard M. Birnholz , *The Validity and Propriety of Contingent Fee Controls,* 38 UCLA Law Review 949, 952-53 (1990), in contract cases, *see* Herbert M. Kritzer, *The Wages Of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 267 n.1 (1998) ("Civil Litigation Research Project data showed that 62% of individual plaintiffs in contract cases had paid their lawyers on a contingency basis."), and in tax cases and patent litigation. ABA Formal Op. 94-389 (December 5, 1994).

In short, the contingent fee is "the dominant system in the United States by which legal services are financed by those seeking to assert a claim." F. MacKinnon, CONTINGENT FEES FOR LEGAL SERVICES 4 (1964). See also Herbert M. Kritzer, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 58-59 (1990). It makes little sense to demand that the reasonableness of fees paid by individuals pursuing damage claims be measured against the yardstick of the "prevailing" hourly rate for similar services. The contingent fee *is* the prevailing rate for such services in the marketplace.

Corporate clients are also demanding – and receiving – contracts for legal work that incorporate aspects of contingency agreements. *See* ABA Formal Op. 94-389, *supra*, noting the trend toward making attorney compensation

in mergers and acquisitions, public stock offerings, and loan transactions contingent in whole or in part on the successful completion of the transaction. Much of this trend is driven by intense dissatisfaction with hourly billing. *See* Cobb, *Competitive Pricing Along The Value Curve; or The Folly of Hourly Rate Pricing*, 14 Legal Econ. Sept. 1988, at 28 (discussing "value added billing" as a replacement for hourly billing); Hertzberg & Stewart, "Contingency Legal Fee for Merger Breaks Ground, Stirs Controversy," Wall St. J., Oct. 24, 1986, at 31, col. 4 (discussing contingent fees in corporate mergers and acquisitions); Reed, *Value Billing: An Update from the ELP Section's Task Force*, 14 Legal Econ. Sept. 1988, at 20.

Even defendants are making increasing use of "reverse contingent fees," in which defendants hire lawyers who will be compensated by an agreed upon percentage of the amount the client saves. *See* ABA Formal Op. 94-389, *supra*.

The reason contingent fee arrangements have become so widely used in such a broad array of circumstances is that they serve important market functions that promote the availability of legal services at reasonable prices.

B. Contingent Fee Arrangements Serve Important Market Functions.

1. Increasing Access to the Marketplace.

The contingent fee provides legal representation for many people who could not otherwise afford to secure their rights. *See* Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 Litigation 27 (Summer 1976). Even the harshest critics of contingent fees agree that they are essential to providing access to justice:

> Contingency fees are vital to the vindication of important legal rights in that they enable accident

> victims and other injured persons to have access to both counsel and the courts which would not be otherwise feasible. Under the contingency fee system, clients who cannot afford the risk of liability for attorney's fees if they fail to recover damages can proceed fully with their cases; their attorneys can be paid only from money that the clients actually recover.

Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, Fordham L. Rev. 247, 270 (1996).

This key to the courthouse is not limited to the indigent. The cost of competent representation for even moderately complicated claims can be well out of reach for middle class families. Even the well-off, who might be able to afford to pay tens of thousands of dollars to pursue a substantial claim are likely to forego their rights in the face of a significant probability that their investment may be lost. The contingent fee lawyer essentially assumes the risk of loss.[2]

2. Aligning of the Interests of Attorney and Client

The contingent fee arrangement assures that the lawyer's economic interest coincides with the client's. If the lawyer gets paid only when the client prevails, he or she has a powerful incentive to evaluate the case honestly at the outset and devote the effort required to win. As Judge Easterbrook explains:

> The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest-alignment device is not perfect. . . .

---

[2] It is not accurate to state that those clients who win subsidize the losers – any more than a company whose stock rises is subsidizing those companies in an investor's portfolio whose shares lose value. The attorney who takes a contingent fee case assumes the risk of loss for that case. If it were the attorney's only case, he or she would charge the same prevailing contingency rate.

> But [an] imperfect alignment of interests is better than a conflict of interests, which hourly fees may create.

Kirchoff v. Flynn:786 F.2d 320, 325 (7th Cir. 1986). *See also* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 Tulane L. Rev. 1809 (2000) (citing authorities that show a "broad consensus that percentage-based formulas harmonize the interests of agents and principals better than time-based formulas like the lodestar approach.").

3. Promoting Efficient Use of Resources

It is in the contingent fee attorney's interest to obtain the maximum result for the client while making the most efficient use of resources. Attorneys have strong incentives to avoid duplication and reinventing the wheel by sharing information and resources. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DePaul L. Rev. 457, 472 (1998).

ATLA was founded to promote such efforts by the plaintiff's bar and continues to do so through its education programs, publications and document exchange service. In addition, ATLA has encouraged the activities of litigation groups, which enable attorneys with similar cases to share the expense of discovery and pretrial proceedings. *See* Paul D. Rheingold, *The Development of Litigation Groups*, 6 Am. J. Trial Advocacy 1 (1982).

4. Simplifying Enforcement

The contingent fee arrangement is relatively transparent and simple to administer. The amount of the fee may be unknown when the agreement is signed, but after the counsel and client prevail, the determination is a simple matter of arithmetic. Most clients are ill equipped to oversee

their lawyers to determine whether the number of depositions is excessive or whether a 50-page motion is overkill. Nor does the attorney relish the prospect, after prevailing on the merits, of undertaking a secondary litigation to establish the amount of the fee. Nor, it may be ventured, do judges view such fee litigation as a worthwhile use of their time.

C. The Contingent Fee Does Not Promote Wasteful Litigation or "Windfall" Fees for Attorneys.

Contingency fees have also been sharply criticized. It should be noted, however, that much of the criticism comes from those who are less interested in protecting the clients than in placing obstacles in their way to their day in court. *See* Barry J. Nace, *The "Legal Scholars" Speak on Contingency Fees*, Trial, Apr. 1994, at 7. The most frequently heard complaints are that they encourage plaintiffs to file frivolous lawsuits and allow attorneys to reap very large fees based on very little work. ATLA submits that both objections are factually incorrect.

1. Contingent fees do not encourage frivolous litigation.

The contingent fee provides access to justice for many individuals and businesses who could not otherwise seek legal redress. There is simply no evidence, however, that contingent fee encourages groundless claims. Indeed, the attorney's financial incentive presses in the opposite direction, in favor of selecting meritorious cases. As a study prepared by the Rand Corporation observed,

> The common allegation that the contingent fee induces attorneys to bring claims with little legal merit has no basis in logic. The fact that the fee depends on winning provides an incentive to screen out cases with little legal merit -- an incentive that is lacking with an hourly fee.

Patricia Munch Danzon, Rand Corporation, Institute for Civil Justice, "Contingent Fees for Personal Injury Litigation," Summary at viii (R-2458-HCA, June 1980).

An earlier study conducted by the federal government similarly concluded that "The contingent fee arrangement does not encourage lawyers to accept nonmeritorious cases with a low probability of winning just because the possible recovery is large." Stephen D. Dietz, C. Bruce Baird, and Lawrence Berul, "The Medical Malpractice Legal System," Report of the Secretary's Commission on Medical Malpractice, U.S. Department of Health, Education and Welfare 87, 154 (January 16, 1973).

2. Contingent Fees Do Not Result in "Windfall" Attorney Fees.

The second major objection to contingent fee agreements is that in some circumstances they result in a large fee for very little work by the attorney. Critics point to specific instances, generally involving early settlements of claims that had very little risk of nonrecovery, where the attorney was able to obtain compensation for the client by filling out some routine paperwork. *See e.g.,* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*? 37 UCLA L. Rev. 29, 79-84 (1989).

ATLA submits that such windfalls are not as common as critics suggest. Empirical studies over the years have consistently found that, overall, contingency fee attorneys do not earn substantially more per hour than their counterparts who bill on an hourly basis. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 304 (1998) (data indicates that "returns from contingency fee practice are at best 'somewhat' better than what lawyers earn from hourly fee

practices."); Patricia Munch Danzon, Rand Corporation, supra at viii ("What little empirical evidence is available confirms that, averaging over cases won and lost, the effective hourly earnings of attorneys paid on a contingent basis are similar to the hourly earning of defense attorneys paid by the hour.").

For those abuses that do occur, the authority of courts to alter or set aside a contingent fee contract is "well established." *Schlesinger v. Teitelbaum,* 475 F.2d 137, 141 (3d Cir.), *cert. denied,* 414 U.S. 1111 (1973). Nor have courts been reluctant to use that authority. *See, e.g., In re Gerard*, 548 N.E.2d 1051 (Ill. 1989) (contingency fee agreement struck down where the case merely required the completion of forms to secure client funds not at a risk of loss and where no litigation was required); Brickman, *supra* at 79-84 (citing cases); Neil Galatz and Stacie Hane, *The Ethics Of Contingency Fee Agreements*, 5 Nevada Lawyer 22 (1997); *See generally*, Robert L. Rossi, ATTORNEY'S FEES § 2.8 - 2.10 (2d ed. 1995).

Even where the contingent fee agreement was appropriate when signed, "changes in circumstances occurring after negotiation of the fee agreement may lead a reviewing court to decide, ex post facto, that payment of the fee is unreasonable." ABA Formal Op. 94-389 (December 5, 1994). *See, e.g., Mckenzie Construction Inc. v. Maynard,* 758 F.2d 97 (3d Cir. 1985).

Similar examples are likely to be rare in Social Security benefit litigation before the district courts. However, those courts of appeals that favor using the agreed-upon contingent fee as the starting point in determining a reasonable fee under 42 U.S.C. § 406 make clear that the district judge is to review the award for possible abuses. *Rodriguez* at 746; *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d at 980-81.

III. THE LODESTAR METHOD OFFERS LITTLE MARKET ASSURANCE AGAINST UNREASONABLE FEES.

A. Hourly-Rate Billing Is Based on an Inherent and Perverse Incentive to Maximize Hours Rather Than Results.

The lodestar method is simply a special application of hourly-rate billing. The notion of charging the client based on the hours spent by the attorney is relatively new, coming into its own in the early 1960's. Its adoption has been traced to the confluence of several factors. These include the increasing complexity of litigation and discovery and the decline in lawyers' incomes during the 1950's. See George B. Shepherd and Morgan Cloud, *Time And Money: Discovery Leads To Hourly Billing*, 1999 U. Ill. L. Rev. 91, 92-93, along with the dramatic growth in the size of major law firms and the advent of computerized time management. Carl T. Bogus, *The Death Of An Honorable Profession*, 71 Ind. L.J. 911, 923-24 (1996).

Billing by the hour was promoted by experts in law office management entirely as a means of increasing large law firm revenue, specifically by leveraging the work of the growing cadre of associates. Eugene C. Gerhart, *The Art of Billing Clients*, 1 Law Off. Econ. & Mgmt. 29, 30 (1960). There may be nothing wrong with that. However, it was never designed to result in a more reasonable fee to the client. "[I]ndeed, an incentive emerged to be inefficient and run up billable hours." Bogus, *supra*, at 924.

Predictably, this built-in incentive resulted in a dramatic increase in the number of hours billed, especially by associates. Some boasted as many as 3000 hours a year. *Id.* Some clients rebelled. For example, Zoe Baird, general counsel for Aetna Life & Casualty company, told the 1992 annual meeting of the American Bar Association:

> There is no credible economic theory underlying the hourly billing method, and for that reason, we no longer accept it as the sole, or even predominant, method of pricing legal services. In fact, hourly billing pushes economic incentives in the wrong direction -- weakening rather that strengthening the bonds between performance and pay. . . . Productivity is better measured by results."

Sherry Matteucci, "What the Heck Is 'Value Billing' Anyway?" Montana Lawyer, November 1992, at 2. *See generally* William G. Ross, THE HONEST HOUR 1-8 (1996) (listing the voluminous literature condemning hourly billing).

Worse yet, this perverse incentive to bill more hours tempts many to inflate their time. William H. Rehnquist, *The Legal Profession Today*, 62 Ind. L.J. 151, 153 (1987).

In the 1980's the profession was rocked by the number of leading lawyers at prestigious firms who were indicted or disciplined for defrauding clients. Those clients were presented with legal bills that contained hundreds of thousands of dollars in padded billing, double billing, and outright fictitious billing. See Lisa G. Lerman, *Blue-Chip Bilking: Regulation Of Billing And Expense Fraud By Lawyers*, 12 Geo. J. of Legal Ethics 205 (1999).

The problem is not limited to a few unethical attorneys. In a confidential survey, two-thirds of questioned practitioners said they knew of specific instances of padding. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 Rutgers L. Rev. 1, 93 (1991). Professor Bogus laments that "a significant segment of the bar routinely and patently pads bills and defrauds clients." It is a "silent epidemic." Bogus, *supra* at 914 & 922.

B. The Lodestar Method Incorporates the Perverse Incentives of Hourly Billing.

The lodestar method simply takes the perverse incentives of the hourly rate system and dumps them in the

laps of the district courts. A Task Force Report to the Third Circuit stated:

> [The lodestar approach] encourages lawyers to expend excessive hours, and, in the case of attorneys presenting fee petitions, engage in duplicative and unjustified work, inflate their "normal" billing rate, and include fictitious hours or hours already billed on other matters, perhaps in the hope of offsetting any hours the court may disallow.

Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 247-48 (1985).

The Federal Courts Study Committee followed with its finding that the lodestar method "may unduly burden judges and give lawyers incentives to run up hours unnecessarily, ... lead[ing] to overcompensation or later litigation over fee padding. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 104 (Apr. 2, 1990)

One scholar asserts that these views reflect a "widespread belief" among judges and commentators. Charles Silver, *Unloading The Lodestar: Toward A New Fee Award Procedure*, 70 Tex. L. Rev. 865, 868 (1992) (citing supporting authorities).

ATLA submits that where the parties are necessarily seeking money damages in the form of social security benefits and there exists a market to supply representation on a contingent fee basis, there is good reason to view the agreed-upon contingent fee as presumptively reasonable and no basis for presuming the reasonability of a lodestar fee.

CONCLUSION

For the above reasons, Amicus urges this Court to reverse the decision of the court of appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, and NANCY SANDINE,

Petitioners,

v.

JO ANNE B. BARNHART, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE* NOSSCR[1]

The National Organization of Social Security Claimants' Representatives ("NOSSCR") is a non-profit corporation. NOSSCR has filed *amicus* briefs in several prior cases to assist the Court in our area of law, presenting the viewpoints of our members and their clients. While most of our members are attorneys in private practice, others work in programs that provide free legal services to the poor. Our members include attorneys from all circuits.

Our members regularly represent people who claim benefits in administrative proceedings before the Social Security Administration. The Social Security system of procedures, rules, and entitlements is complex, and many people with claims find they need someone to represent them. Most contested claims are about the issue of disability, but some are about retirement, insurance coverage, financial eligibility, family relationships, procedures, or other issues.

If a claim is denied at all four administrative levels, our members in some cases file actions in federal court against the Commissioner of Social Security ("the agency"), appealing the final administrative denials. Such civil actions are filed under the judicial review section of the Social Security Act, 42 U.S.C. § 405(g). In the vast majority of cases that our private-attorney members file

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[1] The parties have consented to the filing of this *amicus* brief in support of petitioners. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

in court, the claimants have entered into fee agreements specifying that the fee will be 25 percent of any past-due benefits to which the claimant becomes entitled.

When the civil actions lead to awards of benefits, our members may file motions with the district court under 42 U.S.C. § 406(b) for approval of the fees for representation in court. The rules that the courts use in deciding whether to approve the requested fees are important, because they affect the availability of our members to represent people who have meritorious claims.

We present to the Court the interests both of our members and their clients. Our members need fees to be sufficient to permit them to represent or continue to represent people who need judicial review.

Thousands of claimants depend on the courts for vindication of their Social Security claims each year. It is in their interests to be able to offer fees large enough to attract able attorneys to take their case to federal court. In NOSSCR's experience, after claimants win benefits they are satisfied to see their attorneys be paid the intended one-fourth of past-due benefits. In fact, some of our members' clients express frustration if the court will not allow them to pay their attorneys the promised amount.

This fee litigation, like most under § 406(b), did not arise because the clients objected to paying the agreed fees. It was the agency, in a swift turnabout after trying in court to prevent the claimants from receiving any benefits at all, that raised objections to the payment of the requested fees from those benefits.

SUMMARY OF ARGUMENT

The "lodestar" method, which the loser in this litigation wants to use to impose a limit on what the winners can pay their attorneys, is inconsistent with § 406(b) because it favors the time clock over the bottom line – it limits the fee that the client can offer an attorney to an hourly wage with possible bonuses. There is no evidence that Congress intended to restrict claimants to paying their attorneys by the hour, instead of by the job. The lodestar method was developed for setting fees that losing parties are forced to pay opposing counsel under fee-shifting legislation, and is not appropriate for setting fees that clients may offer their own attorneys to take their meritorious Social Security claims to court.

The version of the lodestar method that the Ninth Circuit uses to set fees under § 406(b) is particularly flawed in two respects. First, the Ninth Circuit's decisions are ambiguous about whether district courts, when setting the fees that clients may pay their attorneys, are required to adjust for the contingency of the fee in all cases or only in cases that are especially risky. Second, despite the legal requirement that the fee be contingent, the Ninth Circuit unwisely permits a district court to limit fees to non-contingent hourly rates without articulating any reason for using those lower rates in a specific case.

Instead of the lodestar method, we recommend two alternatives that are more consistent with § 406(b): the "25-percent benchmark" method or a "discretionary multi-factor analysis" approach.

The "25-percent benchmark" method, otherwise known as the "contingency" method, has been adopted by the Second, Sixth, and Seventh Circuits. It uses 25 percent of the past-due benefits as a starting point in setting the fee. This method is more consistent with § 406(b) than the lodestar method, because it honors Congress' choice of contingent fees over non-contingent, hourly-rate fees. Congress found contingent fees to be so appropriate for Social Security claims in federal court that it made contingent fees the *only* permissible fees. The specific figure of 25 percent is a reasonable place to start the analysis. It is a useful and time-honored benchmark for reasonable contingent fees in Social Security cases at the agency level and in common-fund litigation.

If the Court prefers not to adopt the "25-percent benchmark" method, we recommend an approach that we term the "discretionary multi-factor analysis" approach. That approach asks the district court to weigh all of the relevant factors according to the circumstances of the individual case, without giving pre-determined priority to any one factor. A "discretionary multi-factor analysis" approach is more consistent than other tests with Congress' grant of broad discretion to the district courts in § 406(b). The test is used by state bars to evaluate the reasonableness of the fees that attorneys charge their clients. It was used by the courts before the circuits adopted methods that required district courts to elevate the importance of particular factors.

ARGUMENT

I. The "lodestar" method is inconsistent with § 406(b) because it exalts the time spent over the result achieved, limiting the fee that the client can offer an attorney to an hourly wage with possible bonuses; there is no evidence that Congress intended such a result.

In interpreting fee-authorizing statutes, the Court has closely analyzed the text of the provision to discern Congress' intention regarding the breadth of the district court's discretion and the tests it should employ. *See, e.g., Pierce v. Underwood*, 487 U.S. 552 (1988).

The provision to be interpreted by the Court in this case reads:

> Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow . . . a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment. . . .

42 U.S.C. § 406(b)(1). The fee set by the court is the only fee the attorney is permitted to receive from the claimant. 42 U.S.C. § 406(b)(2).

The lodestar method limits attorney fees by directing the district court to put a cap on the hourly rates that the successful claimant can pay the attorney. Contingency and other factors may be considered and may increase or "enhance" the lodestar rate, but essentially the attorney is put on an hourly wage, albeit with possible bonuses.

In reality, contingent fees are higher than non-contingent. "A contingent fee must be higher than a fee for the same legal services paid as they are performed."[2]

If Congress had wanted district courts to limit the hourly rates that claimants could offer attorneys, § 406(b)(1) would have been worded differently when it was enacted in 1965. If Congress had intended the lodestar result, § 406(b)(1) could easily have instructed district courts to determine a "fee at a reasonable hourly rate," instead of a "reasonable fee." A "reasonable fee" in 1965 had no connotation of the later lodestar analysis. The hourly rate is not mentioned or even implied anywhere in the Social Security Act.

To the contrary, the language chosen by Congress, "a reasonable fee for such *representation*," shows that Congress wanted the fee to be reasonable in relation to the representation taken as a whole, not focusing particularly on hours of service. The term "representation" refers to all aspects of the attorney-client relationship, not just the hours spent by the attorney pursuant to that relationship. By contrast, in § 406(b)(2), outside of the reference to a reasonable fee, Congress used the phrase "services rendered." That phrase, if it had been used in the § 406(b)(1) reasonableness test in place of "representation," would have been more susceptible to the interpretation that services should be evaluated at an hourly rate.

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[2] Richard A. Posner, *Economic Analysis of the Law* (5th ed. 1998), at § 21.9; see also, Alba Conte, Attorney Fee Awards (2d ed. 1993), at § 1.08 ("It is axiomatic that attorneys who work on a contingent fee basis must charge a higher fee than those who work on a noncontingent fee basis").

Congress stated in § 406(b)(1) that the fee which could be allowed was 25 percent "of the past-due benefits to which the claimant is entitled by reason of such *judgment*." This eliminated any argument that the court should count only those past-due benefits the attorney can prove the claimant became entitled to as a result of the attorney's *services*. Congress crafted the 25-percent clause to focus exclusively on the bottom line, the favorable judgment, rather than how the attorney helped the client get there. Congress' focus on the judgment in the 25-percent limitation, without reference to the attorney's time, implies that Congress did not intend to emphasize hours of service and hourly rates in 42 U.S.C. § 406(b)(1).

The lodestar method's initial focus on hours and rates also is inconsistent with the order in which Congress placed the phrases in § 406(b)(1). The sentence begins: "Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney . . . . " Thus the district court looks at the judgment favorable to the claimant, the satisfaction of the contingency, and the result of the representation, before it can move ahead to the second part of the sentence, the determination of the reasonable fee. The lodestar method violates a common-sense left-to-right reading of § 406(b)(1) by asking the district court to forget about the judgment, the favorable result, and the satisfaction of the contingency, until *after* it analyzes the hours and hourly rates.

The difference in nature between the 25-percent-contingency test and the "reasonable fee" test in § 406(b)(1) suggests that Congress knew that the 25-

percent-contingency test would be applied before reaching the "reasonable fee" test. The 25-percent-of-past-due-benefits test is a straightforward arithmetical test that measures results. The "reasonable fee" test is a "softer" discretionary test. Congress must have expected that the court would look first at how much the claimant won, to see if a fee request complied with the easier test (25 percent), before proceeding to the discretionary test ("reasonable") that requires weighing more factors. Common sense suggests that the court would then look at the second test ("reasonable") by beginning with the factors already considered in the 25-percent test, not by forgetting about contingent results, changing focus to hours and hourly rates, and only later giving another passing glance to contingent results in order to adjust the "lodestar."

A. The lodestar method was developed for setting fees that losing parties are forced to pay opposing counsel under fee-shifting legislation, and is not appropriate for setting fees that clients may offer their own attorneys to take their meritorious Social Security claims to court.

The lodestar method wastes time. It generates litigation like this. It requires the district court to start from zero in setting a reasonable fee, instead of starting from the fee that the client offered to attract the attorney. It causes litigation over its key factors: the hourly rate, the number of hours, and the availability of enhancements. This type of detailed litigation may be necessary between adverse parties under fee-shifting statutes, but not between satisfied clients and their attorneys.

Petitioners' brief shows in detail that the lodestar method arose more than a decade after § 406(b)(1) was enacted. It began with fee-shifting legislation designed to force losing parties to pay "reasonable" attorney fees to the winning party. This Court has carefully distinguished fees that may be charged to losing parties and fees that may be charged to the winning party by agreement with that party's own attorney. *Venegas v. Mitchell*, 495 U.S. 82 (1990) (fees available from losing parties under fee-shifting statutes do not prevent enforcement of winning parties' agreements to pay their attorneys larger fees).

Congress also has distinguished between statutes that shift fees from losers to winners and statutes regulating the fees that winners can pay their own attorneys. In fee-shifting legislation, Congress has sometimes focused on hourly rates for fees. The Equal Access to Justice Act, 28 U.S.C. § 2412(d), for example, places a specific dollar limit on the hourly attorney rate that can be charged to the losing party. But we know of no federal benefits statutes that place a limit on the hourly rates attorneys can charge their own clients. Some statutes prohibit the attorneys from charging their clients more than a fixed dollar cap,[3] some limit the fee to a percentage of

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[3] *See, e.g.*, 38 U.S.C. § 3404(c)(2) (fees for certain representation before Veterans' Administration limited to $10).

recovery,[4] some prohibit any fee from the client by limiting the fee to the shifted fee,[5] some require the fee to be approved by the tribunal,[6] and some (like this one) use differing combinations of a "reasonableness" test and a percentage limit. We find none, however, that regulates the hourly rate clients can agree to pay their own attorneys. The lodestar concept of limiting hourly rates, while familiar to Congress in shifting fees to opposing parties, is foreign to Congress in regulating the fees that clients can offer their own attorneys.

B. The version of the lodestar method that the Ninth Circuit uses to set fees under § 406(b) is particularly defective.

In each of the three cases before this Court, the claimant and the attorney had agreed prior to the litigation that the fee would be 25 percent of any past-due benefits that might be won. Such a fee agreement, for the maximum fee allowable under § 406(b), is the customary agreement in this field of law. In all of these cases, the district courts' judgments entitled the claimants to past-due benefits as well as future benefits.

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[4] *See, e.g.*, 28 U.S.C. § 2678 (fees for representation in a Federal Torts Claim Act case in court limited to 25 percent of judgment).

[5] *See, e.g.*, 33 U.S.C. §§ 928(a), (e) (fees for representation in a Longshore and Harbor Workers' Compensation case limited to the "reasonable" fee assessed against the employer or carrier).

[6] *See, e.g.*, 45 U.S.C. § 355(i) (fees for representation in a Railroad Unemployment Insurance case must be approved by the agency or court).

In each of these three cases, the attorney requested the full 25-percent fee, with two fees in the $7,000 range (Gisbrecht and Miller) and one of about $14,000 (Sandine). In a fourth case that was decided by the Ninth Circuit at the same time, but not accepted by this Court for review, the same attorney had voluntarily lowered his fee request to less than one-third of the 25-percent agreement, or a fee of about $10,000.

Using the Ninth Circuit's "lodestar" method, the district court cut the fees roughly by half in two cases, and by a quarter in the third case, by limiting the two attorneys to hourly rates of $125 and $150. The district courts found that $125 and $150 were reasonable lodestar rates and refused increases based on the contingency of the fees. *Gisbrecht v. Apfel*, 238 F.3d 1196, 1198 (9th Cir. 2000). The Ninth Circuit affirmed the cuts, and refused to require reasons.

1. The Ninth Circuit's decisions are ambiguous about whether district courts, when setting the fees that clients may pay their attorneys, are required to account for the contingency of the fee in all cases or only in cases that are especially risky.

The Ninth Circuit holds that the district court must consider the contingent nature of the fee in every case, as one of 12 *"Kerr"* factors that may "adjust" the lodestar fee. *Gisbrecht v. Apfel, supra*, at 1198, 1199 ("a district court must consider a plaintiff's request to increase a fee on this basis [the contingent-fee agreement]"), citing *Allen v. Shalala*, 48 F.3d 456, 458 (9th Cir. 1995).

But it is unclear whether a district court in the Ninth Circuit is permitted to increase the lodestar fee because of the contingent nature of the fee in a Social Security case of ordinary risk. The case *Straw v. Bowen*, 866 F.2d 1167, 1170 (9th Cir. 1989), is still cited by district courts that refuse to grant any increase in lodestar fees under § 406(b): "There is no evidence that [these] cases were unusually risky." *See, Widrig v. Apfel*, 140 F.3d 1207, 1210 (9th Cir. 1998) (citing *Straw*). The Court at minimum should clarify that claimants in the Ninth Circuit are permitted to offer their attorneys more than a non-contingent hourly rate, even if their cases pose only average risks of loss.

2. The Ninth Circuit erroneously permits a district court to limit fees to non-contingent hourly rates, despite the legal requirement that the fee be contingent, without articulating any reason for using those lower rates in the individual case.

The Ninth Circuit, unlike other "lodestar" circuits,[7] permits the district court to disallow any contingency increase in the lodestar rate without explanation. *Gisbrecht v. Apfel, supra*, at 1198, 1199 ("Although a district court must consider a plaintiff's request to increase a fee [on the basis of the contingent-fee agreement] [citation omitted], a court *'is not required to articulate its reasons'* for

[7] *See, e.g., Kay v. Apfel*, 176 F.3d 1322 (11th Cir. 1999) ("[t]he weight of any adjustments for factors such as a contingency fee agreement should be clearly articulated in the order awarding fees").

accepting or rejecting such a request") (citing *Widrig, supra*, 140 F.3d at 1211) (emphasis supplied). Since contingency is such an important factor in determining the fee, district courts should be required to articulate a good reason if they use the lower, non-contingent lodestar rates in Social Security cases where the fee is required by law to be contingent.

II. *Amicus Curiae* NOSSCR recommends two alternatives to the lodestar method that are more consistent with § 406(b): the "25-percent benchmark" method (otherwise known as the "contingency" method) and the "discretionary multi-factor analysis" approach.

The lodestar method is not what Congress intended, is fashioned for a different purpose, and does not work very well in Social Security cases. Two alternative methods are suggested, each of which is more consistent with the language of § 406(b), is tailored to § 406(b) cases, and will work better than the lodestar method.

A. The "25-percent benchmark" method adopted by three circuits, which uses 25 percent of the past-due benefits as a starting point in setting the fee, is more consistent with § 406(b) than the lodestar method because it honors Congress' choice of contingent fees over non-contingent, hourly-rate fees.

The 25-percent benchmark method uses the 25-percent contingency found in the statute as a benchmark or starting place in setting the fee, so long as that was the fee that the client offered the attorney. This method is

more consistent with § 406(b) than the lodestar method's limitation of hourly rates is, because § 406(b) "establishes a cap on attorney's fees of 25% of the claimant's award, not a cap on the hourly rate." *Hayes v. Secretary of HHS*, 923 F.2d 418, 421 (6th Cir. 1990).

This method minimizes secondary litigation over fees. "In each case where the contingent fee is found to be reasonable, based on a general assessment of the fee in relation to the nature of the litigation, the need for complicated lodestar calculations, expert evidence, and protracted litigation vanishes." The court assuredly does not rubber-stamp the 25-percent amount, but considers whether deductions are appropriate for at least two reasons: "fraud or overreaching in making the agreement," or "the requested amount is so large as to be a windfall to the attorney." *Wells v. Bowen*, 907 F.2d 367, 372 (2d Cir. 1990). This method is consistent with Congress' intent.

1. Congress found contingent fees to be so appropriate for Social Security claims in federal court that it made contingent fees the *only* permissible fees.

Contingent fees are useful and proper in many settings. Although they are prohibited in some defined areas of law such as family law, they are not generally disfavored. They play a valuable role in encouraging attorneys to screen out cases that have little merit, provide the "key to the courthouse" for people without enough money to pay an attorney a non-contingent fee, and are used widely in business settings, as well. American Bar Association, Formal Opinion 94-389 (1994) ("Contingent

Fees") (noting the use of contingent fees in patent litigation, real estate tax appeals, mergers and acquisitions, public offerings, and use by defendants of "reverse contingent fees"). The ABA Opinion notes that "[t]he use of contingent fees in these areas, for plaintiffs and defendants, impecunious and affluent alike, reflects the desire of clients to tie a lawyer's compensation to her performance and to give the lawyer incentives to improve returns to the client. The trend may also reflect a growing dissatisfaction with hourly rate billing."

Regardless of the wisdom of contingent fees in other areas of law, Congress in § 406(b) gave the highest form of endorsement to contingent fees for Social Security court cases – it prohibited any other type of fees.[8] Congress was well aware that contingent fee agreements were going to be used in these cases, and approved.

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[8] Since § 406(b)(1) on its face applies only where the court renders a judgment favorable to the plaintiff, and the prohibition on other fees in § 406(b)(2) refers to "proceedings before a court to which paragraph (1) of this subsection is applicable," the Court might question whether the claimant could offer the attorney an hourly-rate or flat-amount fee that would be payable if the claim lost in court. One district court allowed that possibility, *Hutchinson v. Bowen*, 676 F. Supp. 72 (D. N.J. 1988). But no other district court case has cited *Hutchinson*, probably because few if any plaintiffs can afford to gamble a fee, plaintiffs would interpret a request for such a non-contingent fee as a signal that the case was weak, attorneys would hesitate to charge a fee of dubious propriety, and the agency apparently believes that such a fee would be illegal. Br. for the Resp't in Opp'n at 12 n.12. Allowing unregulated fees to be paid if the claim lost in court would create a perverse incentive if the fee would be larger in the event that the attorney lost the case.

2. Twenty-five percent is a useful and time-honored benchmark for reasonable contingent fees in other areas of law, including Social Security claims at the agency level.

Congress intended that the limit on contingent fees in these cases would also be a benchmark, a starting place for assessing the reasonableness of requested fees. Section 406(b)(1), as well as limiting the fee, allowed the agency for the first time to pay the amount of the approved fee out of the claimant's past-due benefits directly to the attorney. Because this provision parallels the provision in § 406(a)(4) that allows direct payment of up to 25 percent of past-due benefits as fees for agency-level services, in practice the agency withholds 25 percent of the past-due benefits for possible direct payment of a fee to the attorney, whether the claimant's victory was in court or at the agency level. This withholding of 25 percent of past-due benefits supports the inference that Congress approved the figure of 25 percent as a benchmark for fees.

Twenty-five percent of past-due benefits is also a benchmark for fees at the agency level. An attorney must obtain approval for any fees charged to represent a claimant before the agency. To obtain that approval, the attorney has two options: to file a fee petition for individual consideration by the decisionmaker, or to submit a limited fee agreement that qualifies for virtually automatic approval. The figure of 25 percent appears in both the fee-petition option and the fee-agreement option as a benchmark that, subject to safeguards, defines a reasonable fee. 42 U.S.C. §§ 406(a)(1) (fee petition), (a)(2) (fee agreement).

In the fee-petition option, the 25-percent figure is the largest amount that the agency will pay directly to the attorneys, so it has become a *de facto* limit on most requests.[9] Claimants are further protected against excessive requests because the attorney must file a fee petition with the adjudicator who must fix a "reasonable" fee in each case.

In the fee-agreement option, attorneys can bypass review of their fees by limiting their fee agreements to the lower of 25 percent of past-due benefits or $4,000. The 25-percent fee, up to $4,000, is deemed reasonable and is automatically paid except in the rare case when someone objects. The agency is raising the dollar limit this year from $4,000 to $5,300.

In both the petition and agreement options, 25 percent of past-due benefits is a common starting point that Congress used for determining reasonable fees and shaping the standard fee contracts for most types of Social Security cases.

Twenty-five percent has been used as a benchmark for attorney fees to be paid out of a common fund created by litigation. Fees in common-fund cases vary widely depending on the nature of the claims and litigation. Some courts have concluded that the benchmark percentage for fee awards in many common-fund cases should be about 25 percent. *Mashburn v. National Health Care, Inc.*,

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[9] The administrative fee-setter, unlike the federal judge, has the authority to approve a fee of more than 25 percent of past-due benefits.

684 F. Supp. 679, 692 (M.D. Ala. 1988); *Meshel v. Nutri/System, Inc.*, 102 F.R.D. 135, 140 (E.D. Pa. 1984).

Courts are moving away from lodestar approaches in common-fund cases and toward percentage-of-recovery awards. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 483-86 (S.D.N.Y. 1998). Moving away from lodestar fee setting is seen as "deregulatory" reform because it relies on incentives rather than costly monitoring. "Ultimately, this 'deregulatory' approach is the only alternative to converting the courts into the equivalent of public utility commissions that oversee the plaintiff's attorney and elaborately fix the attorney's 'fair' return." John Coffee, "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions," 86 Colum. L. Rev. 669, 724-25 (1986).

B. In the alternative, a "discretionary multi-factor analysis," which preserves the district court's discretion to weigh all relevant factors, is consistent with Congress' grant of broad discretion to the district court in § 406(b), is used by state bars to oversee the reasonableness of the fees that attorneys charge their clients, and was used prior to the circuits adopting methods that elevated particular factors.

If the Court prefers not to adopt the "25-percent benchmark" method, it should adopt an approach we will term the "discretionary multi-factor analysis" approach. Under this approach, the district court uses its discretion to weigh the various relevant factors as they appear more or less important in the individual case. This method is

consistent with Congress' intent in § 406(b) to give the district court wide discretion.

Congress' intent to vest broad discretion in the district court is apparent here. The phrase "reasonable fee" connotes discretion. The fee to be set is for the specific "representation," not for this *type* of representation; it contemplates an individualized factual determination about a representation that occurred before the court.

The reasoning in *Pierce v. Underwood*, 487 U.S. 552 (1988), is instructive. Since the area of attorney fees is in the general area of "supervision of litigation," and the district court is in the best position to know the factual circumstances, ordinarily wide latitude would be given to the district court. *Pierce* at 559-60.

Further, there are differences among districts in the type and quality of attorneys available, the strengths and weaknesses of the local administrative decisions under review, and the type and quality of briefing needed by the courts. Because of those local differences, the question of a "reasonable fee" is not amenable to a rule or method, so the weighing of factors is better left to the district court in each individual case. *See Pierce* at 561-62 (citing *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10-11 (1980) ("because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow")).

Finally, *Pierce* at 564 rejected the attempts of the opposing parties to substitute tests with slightly different emphases for the one Congress enacted: "We do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it." Here

the lodestar method, binding the district court to emphasize the attorney's hours and hourly rate in every case, is an unwise substitute for the discretion that Congress intended in setting a "reasonable fee."

The "discretionary multi-factor analysis" approach, looking at a list of factors without pre-determined preference for any particular factor, is the traditional test used by state bars to oversee the fees that attorneys may charge their clients. This is a close analogy to courts setting reasonable fees that attorneys can charge their clients. State bars determine the reasonableness of a fee by reviewing a list of factors.[10] Two of the factors are the time and labor required, and whether the fee is fixed or contingent. But there are several other factors on the list, including the novelty and difficulty of the questions involved, the skill required, the customary fees in the area for similar services, the amount involved and the results obtained, time limitations, nature and length of the professional relationship, and the experience, reputation, and ability of the attorney. There is no preference given to any one factor as a matter of law.

Before the circuits began adopting methods that curtailed the discretion of district courts by requiring them to elevate specified factors, many courts used what we are calling here the "discretionary multi-factor analysis." *See, e.g., McKittrick v. Gardner*, 378 F.2d 872, 875-76 (4th Cir. 1967):

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[10] Model Rules of Professional Conduct Rule 1.5; Model Code of Professional Responsibility DR 2-106 (lists of factors substantially identical in both).

> The judge may be assisted by a statement of the time spent by the lawyer, though such statements must be subordinate to the judge's evaluation of the lawyer's contribution to the decision.
>
> . . .
>
> In each case, therefore, the statute requires the court to fix and determine a reasonable fee. It may approve a fee in accordance with a contingent fee contract within the statutory maximum, if it finds, under all of the circumstances, that the fee is reasonable, and in its consideration of reasonableness it may consider all relevant facts and materials, including the contingency of compensation. We suggest no limitations upon the court's exercise of its discretion. We hold only that its discretion must be exercised in each case, without automatic or unquestioning acceptance of contractual arrangements.

The discretion of district courts is broad in many areas. In common-fund cases involving attorney fees of $100 million, district courts in the Ninth Circuit have discretion as to what method or combination of methods to use in setting a reasonable fee, and most circuits allow their district judges the same discretion. *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994). Why should district judges be given any less discretion in considering whether a $7,000 fee in a Social Security case is reasonable?

CONCLUSION

We request the Court to rule that the "lodestar" method does not apply when district courts under 42 U.S.C. § 406(b) set reasonable fees that successful claimants may pay their own attorneys in Social Security cases, and to rule that Ninth Circuit erred by affirming the fees set by the district courts using the lodestar method. We request the Court to order that these cases be returned to the district courts for fee determinations using the "25-percent benchmark" method, or, in the alternative, a "discretionary multi-factor analysis." If instead the Court upholds the lodestar method, we request that these cases be returned to the district courts for new fee determinations with instructions that fees may be increased due to contingency even in Social Security cases having no unusual risk, and that district courts must articulate reasons if they decline to increase fees due to contingency.

Respectfully submitted,

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STATUTORY APPENDIX

42 U.S.C. § 406(b) Fees for representation before court.

(1)(A) Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

. . .

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

(8)

No. 01-131

IN THE
Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, and NANCY SANDINE,
Petitioners,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,
Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When calculating a "reasonable fee" to be paid an attorney pursuant to 42 U.S.C. § 406(b), should a court use an hourly-based "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain other adjustments), or should it employ a rebuttable presumption that the attorney should receive 25% of the benefits awarded to the plaintiff, the maximum award permitted by the statute.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting fairness in judicial proceedings. To that end, WLF has appeared before this Court as well as other federal and state courts in numerous cases involving the reasonableness of attorney fee awards. *See, e.g., Farrar v. Hobby,* 506 U.S. 103 (1992); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *King v. Palmer,* 950 F.2d 771 (D.C. Cir. 1991) (*en banc*). WLF has also filed petitions with the Federal Trade Commission and bar authorities in each of the 50 states regarding the need to more closely regulate contingent fee agreements entered into between attorneys and their clients.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Those who receive disability benefits under Title II of the Social Security Act are unable to work and thus are unlikely to have other substantial sources of income. *Amici* believe it is important that such individuals not be forced to pay large fees to their attorneys when they are awarded such benefits in a court proceeding. *Amici* are filing for the sole

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

purpose of sharing with the Court their views regarding what constitutes a "reasonable" attorney fee in such cases. They have no economic interest in the outcome of this or any other case involving fee awards under Title II of the Social Security Act.

Amici curiae are filing their brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the brief of Respondent.

In brief, this case involves attorneys who represented clients in successful suits to obtain disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*[2] The attorneys subsequently obtained court orders mandating that they be paid fees out of the proceeds of the past-due disability benefits; the attorneys seek review of those orders, complaining that the fee awards were inadequate.

Section 206(b) of the Social Security Act, 42 U.S.C. § 406(b), provides that whenever a federal district court rules

[2] Title II provides for payment of old-age, survivor, and disability benefits to insured individuals (*i.e.*, those who have made sufficient payments into Social Security, or the survivors of such individuals), without regard to financial need. Title II does not encompass Supplemental Security Income benefits (SSI). SSI is a welfare program set forth in Title XVI of the Social Security Act. Disabled individuals can become eligible for SSI payments only if they are financially needy.

in favor of a Title II claimant who is represented by counsel, the court "may" provide for the payment of a "reasonable" fee to attorney, "not in excess of 25 percent" of past-due benefits. Section 406(b)(1(A) further provides that in such cases in which a judgment has been entered for the claimant, the court-ordered fee is the only one that may be paid to the attorney for his work. It is a criminal act for an attorney to collect or even demand an additional fee in cases in which he is eligible for a court-awarded fee. 42 U.S.C. § 406(b)(2).[3]

Three attorneys, Tim, Ralph, and Etta Wilborn, represented each of the three Petitioners in their efforts to obtain

[3] Section 406(b) provides in relevant part:

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

. . .

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of what is allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

Title II disability benefits. Petitioners Barbara A. Miller and Nancy Sandine were unrepresented during their unsuccessful efforts at the administrative level to obtain disability benefits. The Wilborns filed suits on their behalf and obtained judgments that they were entitled to benefits. The Wilborns spent 39.91 hours on Miller's case and 52.4 hours on Sandine's case; the parties do not dispute the reasonableness of those hours.

An administrative law judge (ALJ) determined that Petitioner Gary E. Gisbrecht had been disabled from 1993 to 1996 but not thereafter; he was awarded benefits for that three-year period only. Ralph Wilborn represented Gisbrecht before the Social Security Administration's Appeals Council in any unsuccessful bid to overturn the ALJ's decision. Thereafter, the Wilborns filed suit on Gisbrecht's behalf in federal district court. Before the district judge could rule on the suit, the Commissioner confessed error and admitted that Gisbrecht's disability had not ceased in 1996. Again, there is no dispute as to the reasonableness of the 25.08 hours devoted to the case by the Wilborns before the Commissioner's confession of error.

Following entry of judgment in their clients' favor, the Wilborns filed motions for fee awards in each of the three cases. In each case, they requested an award of 25% of past-due benefits granted to their clients. That amounted to fee requests of $7,500 in the Miller case, $14,000 in the Sandine case, and $7,100 in the Gisbrecht case.[4]

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[4] The Wilborns also sought and received a $2,000 fee, pursuant to 42 U.S.C. § 406(a), for their representation of Gisbrecht before the (continued...)

Each of the district courts before whom the cases were pending granted the fee requests in amounts significantly less than had been sought. The courts computed the fees using the "lodestar" method: they multiplied the number of hours devoted to the cases by a reasonable hourly fee. They then declined requests to adjust the lodestar amount upward to compensate the Wilborns for the contingent nature of their representation -- *i.e.*, the Wilborns would have received nothing if their clients had not prevailed. Petition Appendix ("Pet. App.") 17-22; *id.* at 23-26; *id.* at 33-41. The fees awarded to the Wilborns were $5,461.50 in the Miller case, $6,550.00 in the Sandine case, and $3,135.00 in the Gisbrecht case.

The U.S. Court of Appeals for the Ninth Circuit affirmed the fee awards. *Id.* at 1-11. The Ninth Circuit agreed with the district courts that the lodestar method should be used in calculating fees under 42 U.S.C. § 406(b). *Id.* at 6.[5] While recognizing that upward adjustments of the lodestar fee based on the contingent nature of the representation are appropriate in some cases, the appeals court held that the district courts did not abuse their discretion in

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[4](...continued)
Appeals Council. That amount is no longer at issue, and is in addition to the fee sought by the Wilborns for their district court work.

[5] The appeals court noted that the Second, Sixth, and Seventh Circuits have rejected use of the lodestar method. Those courts have adopted the "contingency" method, under which a contingent fee contract entered into between the attorney and the claimant is presumptively reasonable and should be enforced, so long as the contracted fee is not greater than 25% of the past-due benefits. *Id.* at 6 n.2.

declining to grant an upward adjustment in these cases. *Id.* at 8-10.

The Court granted review in order to resolve the conflict over whether the lodestar method or the contingency method should be used in calculating fees under § 406(b).

SUMMARY OF ARGUMENT

Congress adopted § 406(b) for the express purpose of imposing caps on the fees that attorneys could charge for representing clients in successful federal court suits for the recovery of Title II benefits. There are two distinct features of the cap. First, any fee awarded must be "reasonable." Second, fees may not under any circumstances exceed 25% of the past-due benefits awarded as a result of the suit. Petitioners essentially ask the Court to write the "reasonable-[ness]" requirement out of the statute; they argue that 25% of past-due benefits (the amount specified in virtually all contracts entered into between attorneys and their clients seeking Title II benefits) should be deemed presumptively reasonable. But Congress has determined that it should be up to the courts, not the parties, to determine what constitutes a "reasonable" fee. The "lodestar" method -- the number of attorney hours multiplied by a reasonable hourly rate, followed by appropriate adjustments -- is the method that courts historically have used to determine a "reasonable" fee award.

Moreover, the lodestar method is the fairest method of determining appropriate attorney fees in Title II cases. Petitioners concede that approximately the same number of hours are required to prepare every Title II suit; it seems

only appropriate, therefore, that the fees awarded should be relatively uniform from case to case. Use of the lodestar method assures uniformity; use of the contingency method does not. Cases that are delayed significantly from the date of the alleged onset of disability to the date of award will produce the largest past-due benefit awards -- and therefore the largest fee awards under the contingency method. Such delays are not a valid reason to grant premium fee awards; if anything, attorneys ought to be given the opposite financial incentive. Petitioners complain that the lodestar method does not appropriately compensate attorneys for assuming the risk that they may never be paid for their work. But such assumption of risk to a certain extent can be and presumably is worked into the computation of a reasonable hourly fee. Moreover, as the Ninth Circuit recognized, the lodestar amount can be adjusted upward where appropriate to compensate for unusually risky representation.

Petitioners cite *Venegas v. Mitchell,* 495 U.S. 82 (1990), for the proposition that courts should give effect to the intent of the parties, as expressed in the retainer contract entered into between the attorney and his client. In *Venegas*, the Court determined that Congress, when it adopted 42 U.S.C. § 1988, did not intend "to limit civil rights plaintiffs' freedom to contract with their attorneys." *Id.* at 87. *Venegas* is inapposite. In contrast to Congress's intent in adopting § 1988, it is undisputed that Congress adopted § 406(b) precisely because it wanted to limit the right of Title II plaintiffs to contract with their attorneys. Congress was concerned that due to unequal bargaining positions, Title II plaintiffs were agreeing to pay excessive fees.

Finally, the courts can administer the lodestar method without consuming excessive judicial and attorney resources. They have been doing so successfully for many years under federal fee-shifting statutes as well as in Title II cases. The Wilborns's claim that use of the lodestar method unnecessarily complicated these cases rings hollow, when one considers that it was the Wilborns who chose to file additional fee claims under the Equal Access to Justice Act (EAJA), a claims process that is far more complex than use of the lodestar method in § 406(b) cases.

ARGUMENT

I. USE OF THE LODESTAR METHOD BETTER COMPORTS WITH THE LANGUAGE OF § 406(b) THAN DOES USE OF THE CONTINGENCY METHOD

The Wilborns assert that the Court should follow the lead of the Second, Sixth, and Seventh Circuits and treat as presumptively reasonable, and therefore controlling, any fee agreement entered into between an attorney and a client seeking Title II benefits, provided only that the agreement does not provide for a fee greater than 25% of past-due benefits. Because the fee agreements entered into between the Wilborns and each of their clients provided for a fee equal to 25% of the past-due benefits awarded by the courts, they assert that the Ninth Circuit erred in refusing to award them their requested 25% fee.

That argument is not consistent with the language and legislative history of § 406(b). Congress adopted § 406(b) in 1965 because it believed that some attorneys were charging

"inordinately large fees" to represent Title II disability benefits claimants in federal court proceedings. S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, at 122 (1965). Section 406(b) was designed to cap such fees, without regard to the fees that claimants might have agreed to pay, because Congress did not believe that claimants were in a position to bargain with attorneys in a free and informed manner regarding fee arrangements. *Ramos Colon v. Sec'y of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988).

There are two distinct features of § 406(b)'s fee cap. First, any fee awarded must be "reasonable." Second, fees may not under any circumstances exceed 25% of the past-due benefits awarded as a result of the suit. The "contingency" method of fee computation urged by the Wilborns (whereby a 25% contingent fee is presumptively reasonable) is not a plausible reading of the statute. The contingency method essentially writes the reasonableness requirement out of the statute. If Congress had intended that courts should enforce virtually every contract calling for a fee equal to 25% of the past-due benefits awarded, there would have been no reason for Congress to specify that § 406(b) fee awards must also be "reasonable."[6]

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[6] There is no serious dispute among the parties that virtually every attorney representing Title II disability claimants includes in his/her retainer agreement a provision calling for a fee equal to 25% of the past-due benefits awarded by the courts. Petitioners view this as evidence that the "market" has determined that a 25% contingent fee is the appropriate fee. To the contrary, *amici* view this as evidence that Congress got it right: virtually no disability claimants are in a position to bargain with attorneys regarding rates and therefore are in need of protection. Moreover, it often makes little sense to refer to "market

(continued...)

The Wilborns do not dispute that use of the lodestar method of fee computation -- which arrives at a fee by multiplying the hours that an attorney worked by the reasonable hourly rate, and then makes certain other adjustments as appropriate -- results in a "reasonable" fee being awarded to attorneys. Rather, they assert that in every case there will be a range of reasonable fees, that that range in most cases will include a fee based on 25% of the past-due benefits awarded, and that the courts should defer to the intent of the parties (as expressed in the retainer agreement) whenever such deference would still result in a reasonable fee. Pet. Br. 18-19.

There is no support in the statutory language for the Wilborns's argument. The statute speaks in terms of "the court" determining what should constitute a reasonable fee in any given case and makes no mention of the retainer agreement. To the contrary, in light of the purpose underlying adoption of § 406(b) -- Congress's belief that unequal bargaining power between attorneys and clients was leading to "inordinately large fees" being charged in some

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[6](...continued)
treatment" of attorney fee issues arising under federal statutes. As the Court has recognized, the "market" exists here, as under similar federal statutes, only because Congress has created a cause of action for improper denial of Title II disability benefits and then has created a mechanism whereby up to 25% of past-due benefits can be set aside for payment of fees directly to the attorney involved. *See City of Burlington v. Dague*, 505 U.S. 557, 564 (1992) ("'I see the judicial judgment as defining the market, not vice versa.'") (quoting *King v. Palmer*, 906 F.2d 762, 770 (D.C. Cir. 1990) (Williams, J., concurring), *vacated*, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*), *cert. denied*, 505 U.S. 1229 (1992)).

cases -- it is highly unlikely that Congress intended courts to defer to the terms of the retainer agreement in establishing a "reasonable" fee award under § 406(b).

Moreover, Congress made clear that it did not believe that retainer agreements providing for contingent fees in excess of 25% were the sole source of the "inordinately large fees" to which it objected. Rather, the Senate Report indicates that excessive fees were also a product of the "considerable delays" frequently encountered between the alleged onset of disability and the award of benefits; Congress feared that such delays could result in unreasonable fees being awarded if computation were based solely on a percentage of the past-due benefits awarded. S. Rep. No. 404, 89th Cong., 1st See., Pt. 1, at 122 (1965). Accordingly, a rule establishing 25% contingent fees as "presumptively reasonable" in § 406(b) cases is not consistent with congressional intent.

In numerous other contexts in which Congress has directed the courts to determine "reasonable" attorney fee awards, the Court has looked to the lodestar method in making that determination. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983) (fee awards in civil rights cases filed under 42 U.S.C. § 1988); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (fee awards under fee-shifting provisions of federal environmental statutes). There is no reason to interpret Congress's use of the word "reasonable" in § 406(b) in the radically different manner suggested by Petitioners.

II. THE LODESTAR METHOD IS THE FAIREST METHOD OF DETERMINING APPROPRIATE ATTORNEY FEES IN TITLE II CASES

The lodestar method of fee computation is preferable to the "contingency" method espoused by Petitioners because it ensures that all fee requests will be treated equally.

By basing compensation on the number of hours spent on a case, as well as the level of skill and training the attorney brings to the case, the lodestar method ensures that fee awards will be roughly equitable from case to case. The lodestar method provides an incentive for attorneys to devote more resources to cases where doing so is necessary to ensure that the claimants prevail, because they know that they will be compensated for doing so.

A unique feature of Title II litigation is the remarkable uniformity of attorney resources required of each such case. An attorney filing a Title II case does so on the basis of a pre-existing administrative record. No discovery or other time-consuming pre-trial activities are called for. Rather, the claimant's attorney generally files a boilerplate complaint, followed by a detailed motion for summary judgment (or its equivalent). As Petitioners concede, Title II cases typically consume somewhat less than 40 hours of attorney time. Pet. Br. 35 & n.41 (citing surveys from reported decisions).

Given relatively small and roughly uniform levels of attorney resources required by Title II cases, one would expect that the "reasonable" fees awarded under § 406(b) to be roughly uniform from case to case. The lodestar method of fee computation provides just such uniformity -- while at

the same time allowing for variation in unique cases involving particularly complex issues (which demand more attorney time, or a more highly skilled attorney, or both).

In contrast, granting fees based on the presumption that the claimant's attorney should receive 25% of the past-due benefits award results in wildly inconsistent fee awards in similarly situated cases. The inconsistency arises because, as noted above, some Title II case can be delayed considerably from the alleged onset of disability to the time of award. Those cases encountering the greatest delays will produce the largest past-due benefits awards. Because delay could never be deemed a product of superior legal work, there is never a direct correlation between the attorney's performance and increased past-due benefits awards brought about by delay. Moreover, once a claimant is deemed disabled, his/her benefit level is largely pre-determined; there is rarely any way that good attorneys can increase benefit levels beyond establishing their clients' disabilities. Accordingly, the wide case-to-case disparity in past-due benefit awards is wholly unrelated to attorney performance. Use of the contingency method thus results in wide disparities in fee awards that have no rational basis.

The four cases that were before the Ninth Circuit well illustrate that phenomenon. The past-due benefit awards in those cases were as follows: Barbara Miller -- $30,100; Nancy Sandine – $56,000; Gary Gisbrecht – $28,400; and Donald Anderson -- $128,400. The number of attorney hours devoted to each case was roughly equal, but the "presumptively reasonable" fee derived using the contingency method espoused by Petitioners varies widely from case to case. The Wilborns's "presumptively reasonable" fee for

their work on behalf of Donald Anderson was more than four-and-one-half times greater than the "presumptively reasonable" fee for their work on behalf of Gary Gisbrecht.[7] Admittedly, in the *Anderson* case the Wilborns did not seek from the district court the full amount of the fee to which they would have been entitled under the contingency method. Pet. App. 12-16 (fee sought was $10,000, rather than $32,000). But the Wilborn's decision to abandon the contingency method in that case only serves to illustrate the deficiencies of that method. *Amici* submit that the Wilborns's submission of a drastically reduced fee request in the *Anderson* case indicates a recognition on their part that the lodestar method provides a much surer and fairer means of determining a "reasonable" fee award than does the contingency method. There certainly is room to argue regarding how the lodestar method is implemented in particular cases, but it is simply too late in the day to argue that the lodestar method is not the appropriate means by which the federal courts determine a "reasonable" fee.

The Wilborns complain that the lodestar method does not appropriately compensate attorneys for assuming the risk that they may never be paid for their work. But the risk they

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[7] The disparities in fees is particularly ironic, because the Wilborns cite Mr. Gisbrecht's case as a prime example of how a highly skilled attorney can increase the past-due benefits award even after a determination has been made that the claimant is disabled. *See* Pet. Br. 21 n.24 ("A skilled attorney may increase the amount of benefits . . ., as in *Gisbrecht*, by convincing the court that the period of disability lasted longer."). Yet despite the high degree of legal skill displayed by the Wilborns in Mr. Gisbrecht's case, the contingency method of fee awards still resulted in a far lower "presumptively reasonable" fee than in Mr. Anderson's case.

assume is not unique among lawyers. Except for those few attorneys who can demand advance payment, virtually all lawyers must assume a certain amount of risk of nonpayment. Accordingly, the risk of nonpayment to a certain extent can be (and presumably is) factored into the computation of a reasonable hourly fee. As the Court explained in *City of Burlington:*

> The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the case; and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar -- either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. . . . Taking account of it again through lodestar enhancement amounts to double counting.

City of Burlington, 505 U.S. at 562-63.

City of Burlington went on to explain why, in the context of fee awards under a fee-shifting statute, contingency based on the first factor also should not lead to an upward revision of the lodestar amount. *Id.* at 563. The Wilborns accurately point out, however, that *City of Burlington* is distinguishable in one meaningful respect: in a fee-shifting case, the fees are being paid by the opposing party, not (as here) by the party for whom the services were performed. Pet. Br. 45. There are good reasons not to require a losing party to pay enhanced fees to opposing counsel simply because the losing party's case was so strong that challenging the case entailed extra risk of non-payment;

we do not usually punish a party for having a strong case. But in Title II cases, it may make sense to pay premium fees to attorneys willing to take on especially risky cases; without the availability of such premiums, a disability-benefits claimant with a marginal claim might not be able to locate counsel. If, against all odds, an attorney is able to win such a case, the client has no cause to complain if he is asked to pay a high-than-usual fee out of his disability award. Accordingly, *City of Burlington* does not dictate that district courts may never take risk of nonpayment into account in determining a "reasonable" attorney fee under § 406(b).

However, the Ninth Circuit explicitly recognized that contingency enhancements to the lodestar amount *are* appropriate in those § 406(b) cases that are particularly risky. Pet. App. 8-10. The Ninth Circuit's approach is thus eminently fair to attorneys by ensuring that they are compensated for assuming risks of nonpayment that exceed the level of risk already built into hourly rates. In this case, the district courts declined to exercise the discretion granted to them by the Ninth Circuit to award contingency enhancements; but the issue of whether the district courts thereby abused their discretion in that regard is not now before the Court. Indeed, according to the Ninth Circuit, the Wilborns never argued that any of their four cases was particularly risky on an individual basis. *Id.* at 9 n.3.

The Wilborns claim that a majority of the Title II cases filed in federal court are unsuccessful; they argue that without the routine award of § 406(b) fees well in excess of an attorney's regular hourly rate, attorneys are not being fairly compensated for their work. But as the Ninth Circuit pointed out, it would be patently unfair to require prevailing Title II

claimants -- whose claims were, presumably, far less risky at the outset than those of the typical unsuccessful claimant -- to pay enhanced fees in order to subsidize the filing of other lawsuits that were more risky than their own. *Id.* at 9.

In sum, the lodestar method of computing fee awards -- which multiplies the number of hours that the attorney worked by the reasonable hourly rate, and then makes appropriate adjustments, including (on occasion) contingency enhancements -- is the fairest method available, from the standpoint of both clients and attorneys.[8]

III. PETITIONERS' RELIANCE ON *VENEGAS* IS MISPLACED

In support of their contention that courts determining § 406(b) fee awards should defer to the provisions contained in any retainer agreement, Petitioners rely on this Court's decision in *Venegas v. Mitchell*, 495 U.S. 82 (1990). That reliance is misplaced.

Venegas involved a civil rights claim brought under 42 U.S.C. § 1983 by a plaintiff who alleged that police had

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[8] As the *amicus* brief supporting Petitioners points out (*Amicus* Br. 15 n.8), § 406(b) appears to permit attorneys to charge Title II clients an up-front fee at the time they take on a case; that fee would be subject to refund under § 406(b)(1)(A) in the event that a court awarded benefits. Such up-front fees would, of course, reduce the risk of nonpayment at least somewhat. Because Title II benefits are payable without regard to financial need, it is reasonable to assume that at least some claimants could afford to pay legal fees up front. There is no evidence in this record, however, that market conditions would permit attorneys to find clients willing to pay such fees.

conspired to deny him a fair trial through the knowing presentation of perjured testimony. The plaintiff, Mr. Venegas, entered into a retainer agreement with his attorney that provided for a contingent fee equal to 40% of whatever amounts were recovered. After Mr. Venegas won a $2.08 million judgment, counsel obtained a $75,000 fee award under 42 U.S.C. § 1988, which provides for the recovery of attorney fees from the losing party in a civil rights action. Mr. Venegas thereafter sought to avoid having to pay 40% of his judgment to his attorney pursuant to the retainer agreement; he argued that the award of attorney fees under § 1988 should be in lieu of any award under the retainer agreement. The Court unanimously disagreed, and ordered Mr. Venegas to pay the contractually-agreed-upon fee. *Venegas*, 495 U.S. at 90.

Venegas provides no support for Petitioners. It was based on the Court's determination that Congress, when it adopted 42 U.S.C. § 1988, did not intend "to limit civil rights plaintiffs' freedom to contract with their attorneys." *Id.* at 87. In contrast to Congress's intent in adopting § 1988, it is undisputed that Congress adopted § 406(b) precisely because it wanted to limit the right of Title II plaintiffs to contract with their attorneys. Congress was concerned that due to unequal bargaining positions, Title II plaintiffs were agreeing to pay excessive fees. *See* S. Rep. No. 404, 89th Cong., 1st See., Pt. 1, at 122 (1965).

Under principles of contract law, courts ordinarily will hold contracting parties to their bargains. But Congress determined, with respect to attorney fees charged in suits seeking the award of Title II benefits, that fee should be awarded based on the courts' sense of reasonableness, not

based on the parties' intent. In light of that determination, *Venegas* is wholly inapplicable to this case.

IV. USE OF THE LODESTAR METHOD IS NOT OVERLY COMPLEX AND THUS DOES NOT CONSUME EXCESSIVE RESOURCES

The Wilborns argue that the contingency method of fee computation is superior because it is simpler to administer. They argue that if fees equal to 25% of past-due benefit awards are handed out as a matter of course, the process of determining fees would be greatly simplified and would consume far fewer judicial and attorney resources than the lodestar method. Pet. Br. 36-39.

Amici respectfully suggest that the Wilborns are exaggerating the difficulties of applying the lodestar method. It has been successfully used for many years, without imposing any undue burdens on the court system, in connection with the numerous federal statutes that permit a prevailing party to seek an award of "reasonable" attorney fees from the opposing party. It has also been used successfully in Title II cases in the many circuits, including the Ninth Circuit, that use the lodestar method in Title II cases. Given the near uniformity of legal effort required in typical Title II disability cases, it should not be overly difficult for the courts to determine a reasonable lodestar fee in the vast majority of cases.

Adopting a rule that a fee equal to 25% of the past-due benefits award is presumptively reasonable would, no doubt, be somewhat easier to administer than the lodestar method. But that rule turns a blind eye to the statutory language of

§ 406(b) and to Congress's mandate that the courts guard against excessive fees caused by lengthy delays from the alleged onset of disability to the date of judgment.

Moreover, the Wilborns are in no position to complain about any complications brought on by the Ninth Circuit's use of the lodestar method. In each of the three cases before the Court, the Wilborns applied for (and obtained) fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. EAJA fees are available to prevailing parties only where the court determines that the position of the United States was not "substantially justified" and that no special circumstances "make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Clearly, because a determination regarding whether the government's position in a Title II case was "substantially justified" requires a careful re-examination of the entire case, any fee award request under EAJA will be far more complicated than a fee request under § 406(b) decided pursuant to the lodestar method. Accordingly, had the Wilborns's number one goal been to keep the fee issue simple, they never should have filed EAJA requests. Apparently, filing EAJA petitions resulted in a slight net gain for the Wilborns.[9] But attorneys who believe it is worth their while to litigate the issue of whether the government's position was "substantially justified" should not be heard to complain about the relatively slight evidentiary burdens imposed on them by use of the lodestar method in § 406(b) fee proceedings.

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[9] The Wilborns received slightly more fees under § 406(b) than under EAJA in the *Miller* case and slightly less under § 406(b) in the *Gisbrecht* and *Sandine* cases.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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